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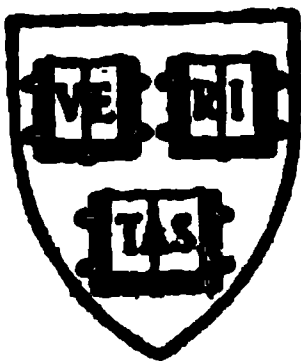
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, AND STAT-
UTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Assistant Reporter.

VOL. 23,
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AT THE NOVEMBER TERM, 1899.

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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. DANIEL W. COMSTOCK. *
HON. ULRIC Z. WILEY. †
HON. WOODFIN D. ROBINSON.
HON. WILLIAM J. HENLEY.
HON. JAMES B. BLACK.

* Chief Judge at May Term, 1899

† Chief Judge at November Term, 1899.

The term of office of each Judge began January 1, 1897.

OFFICERS
OF THE
APPELLATE COURT.

ATTORNEY-GENERAL,
WILLIAM L. TAYLOR.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN
HOYT N. McCLAIN.

CASES

ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1899, IN THE
EIGHTY-THIRD AND EIGHTY-FOURTH YEARS OF THE STATE.

THE WABASH RAILROAD COMPANY *v.* CREGAN,
ADMINISTRATOR.

[No. 2,635. Filed October 3, 1899.]

ACTION.—Death.—Right to Recover for Death of Brother.—Pecuniary Loss.—An action cannot be maintained by an administrator to recover damages, under §285 Burns 1894, for the death of his intestate for the benefit of the brothers of the deceased, where the deceased was under no legal obligation to contribute to their support, had not done so, and no fact existed forming a reasonable expectation of pecuniary benefit to them from the continuance of his life.

From the Carroll Circuit Court. *Reversed.*

Stuart Bros. & Hammond, Pollard & Pollard and *E. P. Hammond, Jr.*, for appellant.

J. F. Hanly, W. R. Wood, D. W. Simms, M. A. Ryan, and *J. H. Gould*, for appellee.

BLACK, J.—The appellee, Patrick Cregan, administrator of the estate of Henry Cregan, deceased, brought his action against the appellant to recover damages for the death of

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his intestate caused by the negligence of the appellant, under the statute, §285 Burns 1894, §284 Horner 1897. There was a general verdict for the appellee, his damages being assessed at \$600. The jury also found specially upon particular questions of fact, stated to them in writing in the form of interrogatories, upon the requests of the parties. The motion of the appellant for judgment in its favor on the special findings in answer to interrogatories, notwithstanding the general verdict, was overruled, and judgment was rendered upon the general verdict.

In the complaint it was alleged, that the decedent at the time of his death was thirty-two years of age, and was engaged in buying and selling cattle, and in the butcher business in the city of Lafayette; that he was an expert in the knowledge of said business, and was earning money at the rate of \$100 per month in such business at the time of his death; that he left him surviving as his sole and only heirs at law his brothers, James Cregan and Patrick Cregan; and that said brothers were dependent upon him for their support and for the profitable conduct of their business at the time of his death. It was not claimed in the complaint that the deceased had rendered any service for either of his brothers except as above mentioned, and it was not alleged that he had contributed any money or property to the support of either of his brothers.

The jury specially found that the appellee's intestate was a man of ordinary intelligence, thirty-two years of age at the time of his death; that for some time before his death his occupation was that of a butcher and cattle buyer; that James Cregan and Patrick Cregan mentioned in the complaint are his brothers; that James Cregan was forty-two years of age and Patrick Cregan was thirty-eight years of age; that up to and for some time before the intestate's death, he was working for his brother Patrick Cregan and receiving for his services his board, washing, and \$75 per month from said Patrick; that the intestate did not have any income except

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what he so received for his said services from his brother Patrick Cregan; that the intestate did not give any of his income received from said Patrick Cregan or otherwise to said Patrick Cregan; that the intestate did not contribute anything to said James Cregan; that the intestate at the time of his death did not leave any personal estate; that he did not die the owner of any real estate except an interest in some real estate which he derived from his father and mother; that his said two brothers are ordinarily able-bodied men and able to support themselves.

In this class of cases, only pecuniary, or material compensation to the beneficiaries can be recovered as damages. *Board, etc., v. Legg*, 93 Ind. 523, 47 Am. Rep. 390. "Damages cannot be recovered for the death of a human being, except by or for the benefit of those who are supposed to have sustained a sensible and appreciable pecuniary loss therefrom. Pecuniary loss, not to the estate of the deceased person, but to those who had a reasonable expectation of pecuniary benefit, as of right, or of duty, or from a recognized sense of obligation, from the continuance of the life, is the foundation of the action." *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111.

While it is not necessary to the maintenance of such an action as the one at bar that the deceased should have been under a legal obligation to render the beneficiaries support, it is important that their relation and situation be shown with a view of affording a basis upon which to determine the amount of pecuniary loss sustained. *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509; *Chicago, etc., R. Co. v. Branyan*, 10 Ind. App. 570.

In an action by a parent for the death of his child, there can be a recovery only for the pecuniary injury the father has sustained, and to enable him to recover full damages for the service of the child during its minority, such damages must be declared for and demanded. *Pennsylvania Co. v. Lilly, supra*.

Where the beneficiaries are minor children of the decedent, pecuniary compensation for the loss of the parent's care and training to the children constitutes an element of damages. *Bourd, etc., v. Legg*, 93 Ind. 523.

In *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, it was said that the law will imply substantial pecuniary loss in some amount to the wife and child from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages and was therefore able to discharge his obligation to support those dependent upon him; and that when the relation of the decedent to those for whose benefit the suit is being prosecuted has been shown, and his obligation, disposition and ability to earn wages or conduct business, and to care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury.

It has been held (*Korrady v. Lake Shore, etc., R. Co.*, 131 Ind. 261), that where the complaint shows a wrongful killing without contributory fault, and that the decedent left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kin folks sustained actual damages; that the legal presumption is that infant children are entitled to the benefit of the father's services and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children; that where the intestate leaves a widow and infant children, the implication of law is that they sustained some injury which the wrong-doer must compensate in damages, the amount of which depends upon the evidence.

By the terms of the statute, the damages "must inure to the exclusive benefit of the widow and children, if any, or next of kin." The existence of such beneficiaries capable of taking under the statute must be alleged and proved, to sustain the action. The purpose of the statute is to provide

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pecuniary compensation for the beneficiaries designated by the statute, which is to be recovered and held by the personal representative as a trustee for such beneficiaries. *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48, 77; *Stewart v. Terre Haute, etc., R. Co.*, 103 Ind. 44.

The administrator sues in his representative character. *Clore v. McIntire*, 120 Ind. 262. The beneficiaries mentioned in the complaint are to be regarded as the equitable plaintiffs, and if there is no right of recovery for them by the trustee, the action must fail. In *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509, where the deceased was an adult who left surviving as his only heirs a father and mother, the court said the measure of damages must be different from that in a case where the deceased has left a widow whom he would have been under legal obligation to support during her life, and children whom he would have been under like obligation to support during their minority; and the court remarked upon the fact that in the case before it the deceased was under no legal obligation to support the next of kin for whose benefit the suit was prosecuted; saying, also, that in the course of nature it was not probable that they would have survived him and thus have become his heirs, nor could the court presume that he would not have married; and that the pecuniary loss recoverable in cases where the deceased left no widow or children must, of necessity, depend upon the particular circumstances surrounding each case.

In *Diebold v. Sharp*, 19 Ind. App. 474, 481, we had occasion to say that the mere existence of relationship of parent or brother or sister to the intestate, in connection with her capacity to earn for herself a certain amount weekly and the probability that she would have lived for a certain period, could not furnish a reasonable basis for the calculation of pecuniary loss to her kindred; and that whatever might be said in an action for the benefit of relatives dependent as a wife or child, the assessment of damages in a case like the one then before this court (where the deceased person was an

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adult woman who left surviving her a father, two brothers and a sister) must proceed, not merely upon the pecuniary ability of the deceased, but rather upon the anticipations of pecuniary benefit which the surviving next of kin are shown to have had reasonable ground to indulge. See, also, *Commercial Club v. Hilliker*, 20 Ind. App. 239.

In *Mason v. Bertram*, 18 Ont. 1, which was an action by an administrator for the death of his son through the defendant's negligence, the court, proceeding upon the rule that it was incumbent upon the plaintiff to show that there was a reasonable expectation of pecuniary or material benefit or advantage by reason of the continuance of the life of the intestate, held that there could be no recovery under evidence showing that the son, who was over twenty-one years old, up to a very short time before he commenced working for the defendant to earn money to buy books, had been living with his father and working as most young men do, that it was intended that he should study for the medical profession, his father to pay the expenses of such education and maintenance while he was preparing for that profession, and that the son while not attending college or in the office of a medical practitioner, learning his profession, would perform work at home with his father and the family.

In *Baltimore, etc., R. Co. v. State*, 63 Md. 135, proof of a reasonable expectation of pecuniary benefit or advantage from the continuance of the life of the person killed being held sufficient to support the action, the deceased made her permanent home with her adult married daughter, one of the plaintiffs, and attended to the housework and looked after the children, while her daughter was away at work, and these services enabled the daughter to work out constantly, whereby she earned \$6 a week, and after the mother's death the daughter was not able to go out to work, because she had no one to take care of the house and children. It was held, that the value of the services of the deceased was the measure of damages, and not what the daugh-

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ter might earn by going out to work, the court remarking that by getting some one to perform the services rendered by the mother, the daughter might still go and work.

In *Demarest v. Little*, 47 N. J. L. 28, the measure of damages being held to be the pecuniary injury consisting of the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased, a partnership in business existed at the death of the deceased between him and his adult sons and his son-in-law. All the partners gave attention to the business, and the capital was furnished by the deceased. His death dissolved the partnership and deprived the surviving partners of such benefit as they had derived from his credit, capital, skill and reputation. It was said by the court, that "the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from a severance of the relation of kinship and not of contract. No damages could be awarded on that ground."

In the case before us, it affirmatively appears that there was no reasonable ground to indulge any anticipation of pecuniary benefit or material aid measurable in money to James Cregan. And the same is true as to Patrick Cregan, unless such anticipation might be based on a conjecture as to the profits he might derive from service to be rendered by the intestate under the contract existing between them. The service rendered for Patrick was not gratuitous, but was to be paid for by Patrick, the compensation being designated. We will not presume that the agreed compensation was less than the value of the service, but, on the contrary, we ought probably to proceed upon the presumption that the value of the service was the price agreed upon between the parties to the contract. At all events, the loss suffered by Patrick was not one caused by the deprivation of a pecuniary advantage which he had a reasonable ground to anticipate from his kinship with the deceased, but was a loss of hired service which might be obviated by employing another person equally

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competent to perform the service. The statute was not intended to compensate such losses. Whether or not the law will conclusively presume some pecuniary injury where the deceased left a widow or minor children, or where the action is by a parent for the death of a minor child, it would seem that no pecuniary loss whatever can be implied from the mere fact that those for whom the personal representative seeks damages were older brothers of the deceased, who, being under no legal obligation to contribute to their support, had not done so, and where there exists no fact forming a basis for a reasonable expectation of pecuniary or material benefit from the continuance of his life. In such case there can be no reason for holding the personal representative entitled to recover nominal damages.

The judgment is reversed, with instruction to the court below to sustain the appellant's motion for judgment in its favor on the special findings in answer to interrogatories, notwithstanding the general verdict.

Henley; J., absent.

SOALE ET AL. v. STATE, EX REL. KIGHT ET AL.

[No. 2,650. Filed October 3, 1899.]

APPEAL AND ERROR.—*Facts Arising after Rendition of Judgment Appealed from.*—A judgment against a guardian for pension money received by him for his ward will be reversed on appeal where, pending the appeal, the pension department set aside the ward's title to the pension money.

From the Vigo Circuit Court. *Reversed.*

D. N. Taylor, McNutt & McNutt and G. I. Kisner, for appellants.

S. M. Houston and Sawyer & Rheuby, for appellees.

COMSTOCK, C. J.—This action was brought by the State of Indiana on the relation of Purley Kight against Wilson H. Soale, guardian of the relator, and Andrew Grimes, James N. Phillips, and Charles Monninger, his bondsmen. The

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cause was put at issue, a trial resulting in a judgment in favor of appellee against all the defendants, in the sum of \$100, and against the defendants Wilson H. Soale, Andrew Grimes and Charles Monninger for the further sum of \$400. In the assignment of errors, the action of the court is challenged in its rulings upon the several demurrers filed to the complaint, and to the answer, and upon the motion for a new trial. For reasons which will hereinafter appear, we do not consider the questions discussed.

The following are, in part, the facts disclosed by the record: John F. Kight, who had been a private in the 85th Indiana Volunteer Infantry in the war for the suppression of the rebellion, died in March, 1880, leaving a widow and two children, Ida and a son, Purley Kight, surviving him. At the death of the father the son was four years old. Soon after this event he was abandoned by his mother and became an inmate of the Asylum for the Poor of Vigo county, Indiana. Appellant Soale was, during several years prior and subsequent to 1888, engaged in prosecuting claims for pensions before the Interior Department of the United States Government, and after some years of search and investigation procured evidence to the satisfaction of the Pension Department that the relator in this case was the son of the dead soldier, and by reason of such relation entitled to a pension. The appellant was duly appointed and qualified by the judge of the circuit court as his guardian, and as such guardian received for the use and benefit of the relator from the Pension Department the sum of \$887. He continued to act as such guardian, paying certain sums of such money to the relator from time to time, until he attained the age of twenty-one years, when the relator demanded payment of the balance remaining in the hands of the appellant. They did not agree as to the amount of such balance and this suit followed.

At the trial of the cause the controlling question was the amount, if any, due the relator. Counsel for appellee earn-

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estly insist that the lower court committed no error in any of the rulings to which appellant excepted and which are discussed on this appeal, but they frankly concede that since this appeal was taken, the Pension Department has set aside the relator's title to the pension money, and that since the foundation of the judgment is gone, they can not ask the court to affirm that judgment. To affirm the judgment would be inequitable, because it would be to award the relator that to which it is conceded he has no claim. It has been held in the following cases that if facts (undisputed) occur since the judgment, which makes its enforcement inequitable, the defendant should be permitted to avail himself of such facts in some way. *Weaver v. Mississippi, etc., Co.*, 30 Minn. 477, 16 N. W. 269; *Chisholm v. State*, 42 Ala. 527; *Aetna Ins. Co. v. Aldrich*, 38 Wis. 107; *Heckling v. Allen*, 15 Fed. 196; *Wetmore v. Law*, 34 Barb. 515; *Clark v. Rowling*, 3 Comst. 216; *Baker v. Judges, etc.*, 4 Johns. (N. Y.), 191; *Gilchrist v. Comfort*, 26 How. Pr. 394.

It is proper to say that the record discloses no censurable conduct in the prosecution of the claim for the pension upon the part of the appellant; nor does it appear that the relator intended any fraud upon the Government. Like the person now found to be Purley Kight, he was left an orphan at an early age. Because of his poverty he became an inmate of the same county asylum. He seems to have been only the victim of misfortune.

In view of the undisputed facts, we are of the opinion that the appellant should have the benefit of the action of the Commissioner of Pensions in setting aside the relator's title, and for that purpose, the judgment is reversed and the trial court instructed to grant a new trial.

Henley, J., absent.

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DURAND & KASPER COMPANY v. ROCKWELL ET AL.

[No. 2,775. Filed October 4, 1899.]

PRINCIPAL AND SURETY.—Bond.—Guaranty.—A bond executed by a salesman and his sureties, conditioned that the salesman should faithfully account for and pay over or deliver unto his employer all moneys, securities or other personal property coming into his possession or control, is a contract of suretyship, and not a collateral guaranty. *pp. 11-13.*

SAME.—Bond.—Action on.—Where by the terms of a bond the sureties are jointly bound with the principal as original promisors, the liability of all the obligors in the bond accrues at the same time, and arises from one breach of the same contract. *p. 13.*

SAME.—Bond.—Contracts.—A condition in a contract entered into by a salesman with his employer that he would conform to any and all rules now in force or hereafter established by the employer for the conduct of its business is broad enough to include a requirement that the salesman should collect the money for goods he himself sold. *p. 13.*

From the Lake Circuit Court. *Reversed.*

Thomas J. Wood, for appellant.

ROBINSON, J.—Suit on a bond executed by Rockwell, as principal, and appellees Rudolph and Raasch as sureties. Judgment in appellees' favor. The grounds of the motion for a new trial were that the finding and judgment were contrary to the evidence and the law. Overruling this motion is the only error assigned.

In 1890, appellee Rockwell entered into a contract with H. C. & O. Durand. By the terms of the contract it was provided that the firm engaged Rockwell to sell goods. Rockwell was to pay his own expenses and receive in lieu of all other compensation forty-five per cent. of the profits on sales of goods made by him or to his trade; to draw his share of profits only as fast as the bills upon which the profits were made were collected in; the firm to be final judge of all credit given customers; Rockwell to use his best efforts to avoid losses and help collect difficult accounts, and to pay

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forty-five per cent. of all losses and bad debts, all allowances and reclamations, all needful expense, costs and fees; and carry his proportion of all suspended and delayed accounts; and to conform to any and all rules the firm might make for the conduct of its business.

In January, 1894, the firm organized into the appellant corporation. Afterwards Rockwell executed a bond to appellant with appellees Rudolph and Raasch as sureties on the bond. The bond was executed by "W. C. Rockwell, as principal, and J. Martin Rudolph and Paul E. Raasch, as sureties," and was conditioned as follows: "The condition of the above obligation is such that whereas the above bound W. C. Rockwell has been assigned to the position of salesman by Durand & Kasper Co., and whereas during the term of employment, or at some time subsequent thereto, there may come into the hands or control of the said W. C. Rockwell moneys, securities, or personal property of some kind belonging to Durand & Kasper Co., or in which they may be interested; now, therefore, if the said W. C. Rockwell shall well and truly, without loss or delay, faithfully account for and pay or deliver over unto the said Durand & Kasper Co., all such moneys, securities, and other personal property so coming into his possession or under his control, and shall not divert or retain any portion thereof upon any pretext whatever, then in that case the above obligation to be void, and otherwise to remain in full force and effect."

We have not been favored with any brief by appellee, but we are informed by appellant's brief that the real controversy is the legal effect of the bond, and that the bond was held to be a contract of guaranty. Appellant's counsel insist that the bond is a contract of suretyship, and we think their view the correct one. The bond shows an original undertaking on the part of appellees Rudolph and Raasch, and not a collateral guaranty. They did not undertake to pay any damages resulting from Rockwell's default; but they undertook to do the thing Rockwell had promised to do

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in the event he failed. Thus this court said in *Wheeler v. Rohrer*, 21 Ind. App. 477: "In a strict collateral guaranty, the guarantor does not undertake to do what the principal is bound to do, but he undertakes, in the event the principal fails to do what he has promised, to pay damages for such failure. A guarantor undertakes to pay such damages as result from the principal's default. A surety undertakes to do the particular thing if the principal fails. See *Nading v. McGregor*, 121 Ind. 465, 470, 6 L. R. A. 686; *Newcomb, etc., Co. v. Emerson*, 17 Ind. App. 482; *Conduitt v. Ryan*, 3 Ind. App. 1; *Lane v. Mayer*, 15 Ind. App. 382; *Bryant v. Stout*, 16 Ind. App. 380; *Brandt Sur. & Guar.* (2nd ed.), §1."

The sureties bound themselves jointly with the principal as original promisors and gave a right to sue them jointly with the principal. The liability of all the obligors in the bond accrues at the same time on the same instrument, and arises from one breach of the same contract. See *Burns v. Singer Mfg. Co.*, 87 Ind. 541; *Morgan v. Smith, etc., Co.*, 73 Ind. 179; *Shearer v. Peale*, 9 Ind. App. 282; *McMillan v. Bank*, 32 Ind. 11, 2 Am. Rep. 323.

It appears from the record that but one contract was made, and that when the firm became a corporation this contract was continued by consent of the parties. The bond refers to a contract, and as this was the only contract made, reference must have been had to it in the bond. From the language used, it was certainly contemplated at the time the bond was executed that money belonging to appellant might come into Rockwell's hands under his employment. The bond was made with reference to the contract, and the contract provides that during his engagement, Rockwell agrees to conform to any and all rules now in force or hereafter established by appellant for the conduct of its business. This clause is broad enough to include a requirement that Rockwell should collect the money for goods he himself sold; and money thus coming into his hands would be within the terms of the bond.

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There is undisputed evidence in the record that Rockwell had collected money belonging to appellant which he failed to pay over. We think the finding is contrary to the evidence; and that appellant's motion for a new trial on that ground should have been sustained.

Judgment reversed.

Henley, J., absent.

WESTERN UNION TELEGRAPH COMPANY v. HENLEY.

[No. 2,589. Filed October 5, 1899.]

APPEAL AND ERROR.—Harmless Error.—Overruling a demurrer to a bad paragraph of complaint is not reversible error, where it appears from the record that the recovery was upon another paragraph. *pp. 15, 16.*

TELEGRAPH COMPANIES.—Sunday Messages.—Failure to Transmit.—Damages.—Complaint.—A complaint in an action to recover damages for failure to transmit a telegraph message which discloses that the contract was made on Sunday must show a reasonable necessity for sending the message on that day, and that the telegraph company had notice of the necessity. *pp. 16, 17.*

SAME.—Sunday Message.—Necessity.—Notice.—The reasonable necessity for sending a telegraph message on Sunday, and the notice thereof to the company, may be shown by the contents of the dispatch itself, and if the language of the message be not sufficient for such purposes, the same may be shown by the averment of extrinsic facts in the complaint in an action for damages for failure to send a telegraph message contracted for on Sunday. *pp. 17-20.*

SAME.—Sunday Message.—Necessity.—Notice.—A telegraph message which stated that the sender would arrive in the city where the sendee resided at a certain time, does not, on its face, show a reasonable necessity for its transmission on Sunday. *p. 19.*

SAME.—Sunday Message.—Failure to Transmit.—Complaint.—Necessity.—Notice.—A complaint against a telegraph company for failure to transmit a message on Sunday, which contains facts indicating a reasonable necessity for delivering it on that day, but which does not show that the company was informed of such facts, is bad on demurrer. *pp. 19, 20.*

SAME.—Sunday Message.—Damages cannot be recovered from a telegraph company for its failure to transmit a message on Sunday in violation of law. *p. 20.*

SAME.—Sunday Message.—Necessity.—Evidence.—In the trial of an action against a telegraph company for its failure to send a dispatch

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on Sunday informing the person to whom it was addressed that her sister would arrive at a certain time, evidence that the company's agent was informed at the time the message was delivered to him for transmission, that the sender was anxious to have the message go at once, as her mother, who lived with the sister to whom the message was directed, was on her death-bed, is sufficient to show a reasonable necessity for sending the message on Sunday. *p. 21.*

TELEGRAPH COMPANIES.—*Failure to Transmit Message.—Damages.—Proximate Cause.*—A telegraph message informing the person to whom it was directed that the sender would arrive in the city where the former lived at a certain time, over a certain railroad, was delivered to the company's agent with the request that it be sent at once, as the sender's mother was on her death-bed at the home of the sender's sister, to whom the message was directed. The company failed to transmit the message, and the sender brought suit for damages and obtained a verdict upon the theory that damages were recoverable for mental distress and nervous prostration suffered by plaintiff by reason of the fact that no person met her when she arrived at the railway station. *Held*, that such a consequence could not have been reasonably anticipated by the parties at the time the contract was made as the result of the breach of it, and that damages cannot be recovered therefor. *pp. 22-26.*

From the Lawrence Circuit Court. *Reversed.*

Louden & Louden, S. O. Pickens, S. N. Chambers, C. W. Moores, G. H. Fearons and R. F. Davidson, for appellant.

J. E. Henley and J. B. Wilson, for appellee.

BLACK, J.—The complaint of the appellee, Flora Henley, against the appellant, contained two paragraphs. In the first it was sought to recover the statutory penalty of \$100 for failure to transmit a certain telegraphic message with impartiality and in good faith and in the order of time in which it was received. In the second paragraph the appellee demanded special damages for like failure. A demurrer to each paragraph for want of sufficient facts was overruled.

It is suggested by the appellee that it appears from the record that the verdict in favor of the appellee was based upon the second paragraph alone, and that therefore the question as to the sufficiency of the first paragraph of the complaint is immaterial. In the second paragraph as orig-

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inally filed the appellee demanded judgment for special damages in the sum of \$1,000. This paragraph was amended so as to make demand for judgment in the sum of \$1,895 as special damages. In the general verdict the jury found for the plaintiff, and assessed her damages in the sum of \$5,000. The jury found specially in answer to one of the interrogatories submitted to them, that the appellee sustained damages in the sum of \$5,000 "by reason of no one meeting her at the train when she arrived." Pending a motion for a new trial, the appellee entered a remittitur for all the sum awarded by the verdict except \$1,895, the amount demanded as damages in the second paragraph of the complaint, and for this sum the court, after overruling the motion for a new trial, rendered judgment.

We think it sufficiently appears from the whole record that the recovery was upon the second paragraph alone, and therefore we agree with counsel that there could be no reversible error in the overruling of the demurrer to the first paragraph.

In the second paragraph of complaint it was shown that the message was delivered to the appellant's agent at Greencastle Junction, and the contract was made with him for its transmission, on Sunday, the 1st day of September, 1895, and it was sought in the pleading to show that the transmission of the dispatch on that day was a work of necessity. The message set forth in the pleading was as follows: "Greencastle Junction, Ind., Sept. 1st, 1895. To Violet Chollar, 1606 Vermont Ave., N. W., Washington, D. C. Arrive Baltimore and Potomac, Monday, 1:30 p. m. Flora." It was alleged, "that it was necessary that said dispatch should be transmitted on said 1st day of September, 1895, in order to relieve suffering, avert harm, and prevent serious loss of health and life, and that defendant's agent at said Greencastle Junction then and there had knowledge of such necessity."

The appellee in her complaint based upon the contract,

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having expressly shown it was a contract made on Sunday, for the transmission of a telegraphic dispatch on that day, and having attempted to show that the contract relied upon was not void under the statute by stating matter intended to bring it within the exception expressed in the statute, it was necessary to the sufficiency of the pleading that the validity of the contract be properly shown thereby. The invalidity of the contract was not a matter of defense, but the burden was upon the plaintiff to state facts establishing its validity. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

In such case it is essential for the avoidance of the statutory inhibition of such a contract made on Sunday, that there existed a reasonable necessity for sending the message on that day and that the telegraph company had notice of that necessity. This reasonable necessity and also the notice thereof to the company may in many cases be sufficiently shown by the contents of the dispatch itself; and if the language of the message be not sufficient for such purposes, the necessity and the notice to the company may be shown by the averment of extrinsic facts. *Western Union Tel. Co. v. Yopst*, *supra*. In that case the court quoted approvingly from *Flagg v. Inhabitants, etc.*, 4 Cush. 243, the following language: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety in the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute."

While it is sufficient to constitute the reasonable necessity which will bring the case within the exception expressed in the statute if there be a moral need or propriety under the circumstances of the particular case, yet the fact that it will be conducive to pecuniary profit or business success, or will subserve the convenience of the sender, is not sufficient to constitute such reasonable necessity, and a dispatch whose contents would sufficiently notify the company, on a day

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other than Sunday, of the importance of promptness in forwarding and delivering it, and of the character of the damage which might reasonably be apprehended from delay or failure to transmit, might not be sufficient to apprise the company of the reasonable necessity of transmitting the same dispatch if presented on Sunday. If the sending of the message is necessary "in order to relieve suffering, and avert harm and prevent serious loss of health and life", and the company's agent when he receives the dispatch has knowledge of such necessity, either from the contents of the message or from extrinsic facts of which he has information, this will be sufficient to validate the contract.

A Sunday message as follows: "Meet the E. T. train at 3 o'clock," did not show on its face that its subject-matter concerned anything in the nature of charity or necessity. *Willingham v. Western Union Tel. Co.*, 91 Ga. 449, 18 S. E. 248.

A message, the object of which was to apprise the sender's mother that a certain friend of the family would be with her to take dinner in company with the sender, was held to be wholly wanting in any character of necessity or charity, and the court expressed the opinion that neither of these characters is to be assumed by mere presumption and without any proof whatever. *Western Union Tel. Co. v. Hutcherson*, 91 Ga. 252, 18 S. E. 297.

In *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, it was held that a message reading, "Bring forty dollars if you want record," did not show a reasonable necessity for sending the dispatch on Sunday.

In *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558, the message for the transmission of which the contract was made on Sunday, was, "Come up in morning; bring all." It was said by the court that upon their face these words implied a friendly invitation to visit the sender, and that such a message could not be regarded as a "work of necessity" within the meaning of our statute.

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The message set forth in the complaint bore as a signature a feminine Christian name, and by its terms, if transmitted, would inform the sendee, named Violet Chollar, that the sender would arrive at Washington by the Baltimore and Potomac Railway the next day at 1:30 p. m. On its face the message did not disclose the purpose of the journey or indicate the age or condition of the sender or sendee or the relation between them, or whether the sender was traveling alone or with an escort or with others under her care. It did not purport to be a request for any person to meet her or to provide a conveyance for her. It did not show that it was sent in response to any message or suggest the illness of any person, or a desire that the coming of the sender should be communicated to any person besides the sendee. It was a simple announcement of the time of the sender's expected arrival in Washington, and the purpose to be accomplished by sending it, so far as it showed, might have been such that its sending could not be regarded as a necessity within the meaning of the statute. Its sending might be a means of furthering convenience, or promoting a political purpose or a business undertaking, or might be a mere courtesy not specially demanded by any exigency, and which, however proper, might have been as well performed on another day. We think it can not properly be said that a reasonable necessity was shown in the contents of the message. The pleader, possibly taking this view, sought to show by the allegation of extrinsic matter taken in connection with the contents of the dispatch the necessity and notice thereof to the company. In addition to the allegation which we have quoted the pleader further on in the complaint stated some facts which indicated a reasonable necessity, but did not show that the company was informed of such facts. No attempt to show notice to the company was made except in the language above quoted.

It is the office of a pleading under the code procedure to state issuable facts, to show what was done or what was not

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done, so that looking to the acts and omissions stated, the court may, by applying the law thereto, determine whether a cause of action or a defense has been shown. It is not proper, omitting the facts, to state their supposed legal force or effect. Plainly it would not be sufficient merely to state that it was necessary to send the dispatch on Sunday, and that the company's agent had knowledge of said necessity. It does not seem to change the character of the pleading simply to state that the transmission was necessary for a named purpose of a general character, such that, if the facts were stated from which the court could determine that a purpose of that character would be promoted, it might properly conclude that there was a reasonable necessity within the meaning of the statute. It is not shown how the agent received knowledge of the necessity. It is not alleged what was said to him and by whom, or that anything was said by any person, or that anything other than the dispatch was shown to him. It does not appear from the facts stated whether or not what took place was sufficient to charge the company with notice of the existence of a necessity.

In *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, it was said that to avoid the defense which the statute forbidding the making of contracts on Sunday creates, it was incumbent upon the plaintiff after having alleged that the contract was made on Sunday, "to plead facts showing that there was a reasonable necessity for making the contract on that day, and that the defendant knew of this necessity."

There can not be a breach of legal duty in failure to perform a contract to do a thing prohibited by law, and punishable as a crime. The making of the contract on Sunday was illegal, and the service contracted for would be illegal. The appellee could not base a legal right upon such a contract, and for the failure of the appellant to perform it no damages, not even nominal damages, could be recovered. She was not entitled under her complaint to recover the price paid for the transmission of the dispatch. *Perkins v. Jones*, 26 Ind. 499.

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It is proper that we should decide another question presented which would arise upon another trial. It appeared in evidence that the appellee was born and reared in the city of Washington, D. C., where at the time of the sending of the dispatch her mother and five sisters resided. She had frequently visited that city within a recent period before this journey. She knew that her mother had been ill for some months. The appellee, or her husband, at Bloomington, Indiana, where they resided, received a dispatch from her sister, Violet Chollar, at Washington, as follows: "Ma is worse. Doctor says come; bring children." The appellee in company with her two children, a girl aged ten years and a boy aged five, started for Washington the next day, which was Sunday. Her husband accompanied her to Greencastle Junction, and there assisted her in changing cars. She cautioned her husband to send a telegram to her sister, Violet Chollar, and after her train had left Greencastle Junction, he delivered to the appellant's agent at that station the dispatch first above quoted, which was never delivered to the person addressed or to any one for her. It does not appear that the appellee saw the dispatch or knew its contents or directed what should be stated therein. Her husband paid fifty cents for the transmission of the message. Being asked, on his examination as a witness, what was said, if anything, between him and the appellant's agent with reference to this telegram, he testified, "I told him that my wife and children were going east, to the bedside of my wife's mother, and I wished he would rush that message." Being further asked what he mentioned with reference to his knowledge of his wife's mother, he answered, "I mentioned that she was on her death-bed." He was next asked, "What did the agent say," and answered, "He said that he would do it." This was all that was shown relating to the information of the agent in addition to the contents of the message. There was enough, we think, to establish a reasonable necessity for sending the message on Sunday.

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In seeking to show the damage suffered by the appellee, evidence was introduced to the effect that she was in good health upon the arrival of the train in Washington, between one and two o'clock in the afternoon of Monday, the 2nd of September, 1895; that she alighted from the train and looked all around for her sisters; that she alighted on the platform and walked up to the gate and looked all around for her sisters; that when she got near the gate she began to feel a very sickening sensation, a dizziness and a sense of humiliation; that she then went to the ladies' waiting-room, and that she must have sat down in a seat, that she really felt so dazed and sick and humiliated,—having five sisters living there and not being met,—she sat down in the ladies' waiting-room and sent her little girl for a carriage, but she did not get one; that while in the waiting-room she felt very faint, sick and humiliated and had an anxiety to know how she would reach her destination with her children and baggage, not being able to secure a carriage; that she felt very faint, and was in a very exhausted condition, and her little girl threw some chloral on her mouth or lips. When or where, or by whom, or for what purpose the chloral had been procured does not appear. She further testified, that not being able to go to her sister's house at once and having friends at the American Hotel, which was near by, a block distant, she walked thither and took a room to which she was assisted by the clerk. It appeared that she had been in the habit of stopping at this hotel, and that she stopped there during some portion of this visit after having been at the house of her sister. At the hotel she sent to a drug store and procured some "mustards" and "Bromo-Seltzer." She testified that she had read of "Bromo-Seltzer," and that "mustards was my own remedy." After lying down about two hours at the hotel, she went with her children and luggage to a street car, in which they went to a place about three blocks from her sister's house, to which they then walked. She testified that her children carried the baggage

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and she leaned on their shoulders; that she had a fainty spell on the street car and could scarcely walk. When she arrived at her sister's house, the place of residence of her mother, she saw crape on the door. Her mother had died that day some hours before appellee's arrival in the city. Before seeing the crape on the door she had no knowledge of her mother's death. Testifying with reference to the time when she got to the door of the house, she said she remembered reeling, but did not remember anything more, also that she remembered that she leaned against the iron railing on the steps, that she supposed that she was unconscious after she was led into the house. Further testimony was to the effect that she was ill during her stay of two weeks in Washington and had not recovered at the time of the trial, being subject to spells of nervous prostration. Her physician testified that he believed her disability to be permanent.

The appellee could not recover any damages because of the disappointment, anxiety, or chagrin of any member of her family arising from failure to receive the announcement of her coming through the dispatch sent by her husband, or because of her disappointment or grief at not seeing her mother before her death, which occurred before appellee's arrival in the city. The failure of the appellant to transmit the dispatch could not be regarded as the proximate cause of her grief and prostration occasioned by the information of her mother's death. It appears from the special findings of the jury that all the damages awarded by them were given for injury sustained "by reason of no one meeting her at the train when she arrived."

The only injury shown by which to measure damages, other than nominal, was mental distress and consequent nervous prostration; and counsel have ably discussed the subject of mental anguish as an element of actual damages; but we do not find it necessary to respond in this case by the expression of an opinion on that subject. The case was tried

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and the verdict was rendered upon the theory that damages were recoverable for mental distress and nervous prostration suffered by reason of the fact that no person met the appellee when she arrived at the railway station in Washington. Under well settled principles, there was not, we think, such a consequence of the breach of the contract that the injury to the appellee could be the measure of damages, for the reason that such damages can not be fairly and reasonably considered as arising naturally from the breach of the contract itself, or as having been in the contemplation of both parties when they made the contract as the probable result of the breach of it.

In the often mentioned case of *Hadley v. Baxendale*, 9 Exch. 341, (S. C. 26 Ency. L. & Eq. 398), the rule was expressed as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract." See *Can-*

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dee v. Western Union Tel. Co., 34 Wis. 471; *Berkey etc., Co. v. Hascall*, 123 Ind. 502, 507; *Lowe v. Turpie*, 147 Ind. 652; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246.

The general rule for the ascertainment of the damages to the plaintiff in an action for delay in transmitting his telegraphic dispatch was stated in *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, as follows: "They are such as naturally arise from the breach of the contract, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as to the probable result of the breach of it." See, also, *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649.

In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, it is said, that under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. See, also, *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577.

In *Western Union Tel. Co. v. Bryant*, 17 Ind. App. 70, it was said, that a message which read, "Cannot come to-day; will come to-morrow," sent by Nancy Bryant to John Bryant, did not apprise the Telegraph Company that a failure to send it would be likely to cause mental distress, or suggest that humiliation or mental distress would reasonably result from the failure of the person to whom it was addressed to be present upon the arrival of the sender at the place of destination.

The contract itself was what was agreed to by the parties and was expressed in the written dispatch. It imported notice of the arrival of the signer of the message at Washington at a specified time. Adding to its contents all that

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was said to the appellant's agent, it can not be said that the fact that no person met her at the station, with the injurious effect which it was claimed was caused thereby, was a proximate result within the rule. It might be that the appellee, who does not appear to have known what was in the message, or to have directed what should be written therein, expected to be met by some of her relatives, concerning whom the appellant knew nothing. It does not appear that the person addressed would have met her, but this sister of the appellee was of the opinion when testifying that she would have sent her husband. For the appellee to have been met because of the receipt by the sendee of such a message as was delivered to the appellant's agent, would have involved the independent voluntary action of others taken upon the construction which might be placed upon the message by others, and their disposition and ability, under circumstances of which one of the parties to the contract had no notice. . If such an extraordinary effect as the appellee in her testimony described can be regarded as a result of her not being met, which should be compensated in any case, yet her injury can not be reasonably considered as having arisen from the appellant's breach of the contract according to the usual course of things, or as being a probable result reasonably supposed to have been contemplated by both parties when the contract was made. To conclude that the appellee's injury was occasioned by the breach of the contract would be indulging in conjecture.

Judgment reversed, and cause remanded with instruction to sustain the demurrer to the second paragraph of complaint.

Henley, J., absent.

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[No. 2,751. Filed October 6, 1899.]

DECEDENTS' ESTATES.—Parent and Child.—Funeral Expenses of Child.

—The funeral expenses of a minor do not constitute a charge against his estate, where he leaves a father surviving him who is able to pay them.

From the Marion Circuit Court. *Reversed.*

J. W. Noel and *F. J. Lahr*, for appellant.

Wilborn Wilson, for appellees.

COMSTOCK, C. J.—Charles E. Raper, a minor, died in March, 1896. In June of the same year, letters of administration on his estate were issued to the Marion Trust Company. The claim in suit is for funeral expenses due the undertaker who officiated at the burial of the deceased, and which appellee claims to own by virtue of an assignment.

In July, 1896, the undertaker brought suit for this claim against the father of the deceased; the cause was put at issue but was not tried, and in February, 1897, was dismissed as "compromised and settled." The assignment of the claim to appellant bears date March 16, 1897. Upon application, appellant, in whose favor a claim for medical services rendered the deceased had been allowed by the court against the estate, was made a party defendant for the purpose of resisting appellee's claim. The trial resulted in a judgment for the amount claimed in favor of appellee. The administrator, not joining in the appeal, was made an appellee.

The only error assigned is the overruling of the motion for a new trial. The first reason set out in the motion is that the finding of the court is contrary to the law. The second that it is contrary to the evidence. The third that it is contrary to the law and the evidence. These grounds are discussed together in the brief of counsel.

The deceased left surviving him a father. The claimant was his step-mother. It is insisted by appellant that the fu-

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neral expenses, which are the foundation of the claim, are not a charge against the estate. This position is supported by authorities. From the many authorities holding that it is the duty of the parent to provide for the necessities of life of his minor children, we cite the following: *Kinsey v. State*, 98 Ind. 351; *Haase v. Roehrscheid*, 6 Ind. 66; *State v. Clark*, 16 Ind. 97; *Myers v. State*, 45 Ind. 160; *Corbaley v. State*, 81 Ind. 62; *State v. Roche*, 91 Ind. 406; *Lenskie v. Kerr*, (Tex. Civ. App.), 34 S. W. 766; *Moore v. Moore*, (Tex. Civ. App.), 31 S. W. 532; *Cooper v. McNamara*, 92 Iowa 243, 60 N. W. 522; Field on Parent & Child, §54. Schouler on Dom. Rel. says at §242a: "A father is, in general, liable for the decent funeral expenses of his deceased minor child," citing *Bair v. Robinson*, 108 Pa. St. 247; *Sullivan v. Horner*, 41 N. J. Eq. 299, 7 Atl. 411. The foregoing is the general rule. When the parent has not property of his own to support his minor child, resort may be had to the property of the child for such purpose, but such condition must first be made to appear before such resort can be had. *Corbaley v. State*, *supra*; *State v. Roche*, *supra*; *Rhode v. Tuten*, 34 S. C. 496, 13 S. E. 676. With equal reason a claim may be enforced against the estate of the minor for funeral expenses when the father is unable to pay them. It does not appear from the record that the father was not able to pay the claim in suit.

Counsel for appellees cite a number of cases to the effect that a minor is liable for the reasonable value of necessities which may have been furnished him. This exception to the general rule that an infant cannot bind himself by his contract, is for the benefit of the infant himself, and not for those who give him credit. It has been decided that medical attention and articles furnished for the purposes of health may be recovered for, as necessities. *Saunders v. Ott*, 1 McCord 351; *Price v. Sanders*, 60 Ind. 310. The infant is held on a promise implied by law, and not strictly speaking on an actual promise. *Trainer v. Trumbull*, 141 Mass.

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527, 6 N. E. 761. In *Chapple v. Cooper*, 13 M. & W. 252, an infant widow was held bound by her contract as for necessities for the funeral expenses of her husband who left no property to be administered. An infant husband may contract for the interment of his deceased wife or children, so as to be bound by his contract. In citing the case just mentioned, Mr. Schouler in his *Domestic Relations*, at §199, says: "The contract will have validity, because it is a contract for the burial of those who are *personae conjunctae* with him by reason of the marriage, and as such it is to be regarded as a contract for his own personal benefit."

Appellees cite 1 Connolly (N. Y. Surr.), p. 59, as holding that the estate of the minor was liable for the funeral expenses. A father died testate leaving a considerable fortune to a minor child. Upon his death, while still a minor, unmarried, and without creditors, the executor paid the funeral expenses. Upon settlement, the court held that the executor had no legal authority to make the payment, but that as it was made in good faith, and the amount reasonable, it would be equitable to allow him credit for the same in his settlement of the trust, as an administrator of the minor's estate would have been authorized to pay the same. The facts would certainly authorize the payment out of the estate. No question of the liability of the father, or the solvency of the minor's estate was raised as in the cause before us.

Appellees argue that if the claim in suit is not a proper charge upon the estate, that appellant's claim is without foundation. It does not follow. We do not know what evidence was introduced in the trial of appellant's claim. It will be presumed, in the absence of a showing to the contrary, that it fully justified the judgment.

We conclude that the claim so far as the facts are shown by the record is not a charge upon the estate. The only cases of which we are advised in which courts have passed directly upon the question hold the father liable. Nor does it seem unreasonable that the father having under the law

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control of the person and earnings of his minor child should be required, when financially able, to give it suitable burial.

The remaining questions discussed relate chiefly to the assignment to appellee of the claim against the estate, upon which we are of the opinion it is not shown to be a charge, and to other questions which may not arise upon a second trial. We do not therefore deem it necessary to consider them.

The judgment is reversed, with instruction to sustain the motion for a new trial.

Henley, J., absent.

ARCHIBALD v. HARVEY ET AL.

[No. 2,890. Filed October 10, 1899.]

INSTRUCTIONS.—Misstatement of Pleadings.—Harmless Error.—Replevin.—A statement in an instruction in an action in replevin that plaintiff avers that defendant obtained possession of the property unlawfully, when no such allegation was made, is harmless, where other instructions informed the jury that it was only necessary for plaintiff to prove ownership and right of possession in the property at the time the action was commenced. *pp. 30, 31.*

SAME.—Harmless Error.—Where all of the instructions taken together fairly state the law applicable to the evidence, the judgment will not be reversed. *p. 31.*

From the Crawford Circuit Court. *Affirmed.*

Major W. Funk, for appellant.

John H. Weathers, for appellees.

HENLEY, J.—This was an action in replevin. Appellant sought to recover the possession of a buggy valued at \$50. In the lower court, judgment was rendered in favor of the defendant, and plaintiff appeals. The only question presented by the assignment of error relates to the action of the court in overruling appellant's motion for a new trial. Under the assignment of error appellant's counsel contends that the lower court erred in giving to the jury instruction numbered one, which was as follows: "This is an action brought

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by the plaintiff, against the defendant, to recover the possession of a certain buggy, of which plaintiff alleges she is the owner and entitled to the possession, and that defendant obtained the same unlawfully, and unlawfully retained it from plaintiff, to her damage in the sum of \$100, and that said property was not taken by virtue of any writ of execution or other writ against her."

This instruction, it is contended, unfairly states the averments of the complaint in this, that the complaint does not aver that appellee obtained the possession of the property in controversy unlawfully. Appellant's counsel are correct in their position, but the error, if any, in giving such instruction was harmless. It appears by the record that the court instructed the jury repeatedly in the course of his instruction, that, in order for appellant to recover it was only necessary under the issues formed by the complaint and answer, that she prove ownership and right of possession in the property at the time the action was commenced. The instructions taken together fairly stated the law applicable to the evidence. In such cases this court will not reverse the judgment of the lower court. *Cook v. Woodruff*, 97 Ind. 134; *White v. Beem*, 80 Ind. 239; *Young v. Clegg*, 93 Ind. 371.

The judgment of the lower court is affirmed.

THE STATE v. TRUEBLOOD ET AL.

[No. 8,179. Filed October 10, 1899.]

COUNTY COMMISSIONERS.—Allowance of Illegal Claim.—Criminal Prosecution.—Curative Act.—An indictment returned against the board of county commissioners for allowing a claim against the county for the expenses of holding a gravel-road election, contrary to the provisions of §6924 Burns 1894, was properly quashed after the passage of the act of February 24, 1899 (Acts 1899, pp. 128-130), which legalized such payments.

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, *J. A. Zaring*, *McHenry Owen* and *S. B. Lowe*, for State.

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Matson & Giles, Edwards & Edwards and Hottel & Lawler, for appellees.

WILEY, J.—Appellees constituted the board of commissioners of Lawrence county. One of the township trustees of said county filed a verified claim in the auditor's office for the expenses of holding a gravel-road election. The appellees, acting as a board of commissioners, after making some deductions thereon, allowed the claim. For this action they were jointly indicted. The indictment, omitting the formal parts, was in the following language: "That one Henry C. Trueblood, Daniel B. Guthrie and Ambrose K. Sears * * * were then and there duly elected, qualified, and acting members of the board of commissioners of said county, by reason of which they and each of them were officers under the laws of the State of Indiana. That on the 28th day of February, 1898, one Homer West who was then and there the duly elected, qualified, and acting trustee of Shawswick township in said county filed his verified claim in the office of the auditor of Lawrence county for the sum of two hundred and sixty-five dollars and seventy cents (\$265.70) for the total expenses of a gravel-road election held in Shawswick township in said county on the 26th day of February, 1898. That nothing was due on said claim from said county or its said board of commissioners. That said county was not liable for said claim in any event. That the same was chargeable to the petitioners for the roads voted for at said election, who alone were liable for said claim. That in the month of March, 1898, said claim came before said board of commissioners * * * for consideration and action. That it then and there became and was the duty of said commissioners to vote to reject said claim, but said Henry C. Trueblood, Daniel B. Guthrie and Ambrose K. Sears commissioners aforesaid and each of them then and there unlawfully and extorsively failed and refused to perform the duties of their said offices within the time and in the manner prescribed by law, in this to wit: They each unlawfully and extorsively failed

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to vote to reject said claim, but each then and there voted to cut and reduce said claim to the sum of two hundred and twenty-three dollars and seventy cents (\$223.70) for which sum said commissioners each voted to allow and did allow said claim."

The appellees jointly moved to quash the indictment, which motion was sustained; the State excepted, and has assigned such ruling as error. We are informed by the prosecuting attorney and other counsel representing the State in this appeal, that the indictment is based on §2018 Horner 1897. So much of that section as is applicable to the question for decision is as follows: "Any officer under the Constitution or laws of this State, * * * who fails to perform any duty in the manner and within the time prescribed by law, shall, upon conviction thereof, be fined," etc. It is the theory of the State, as expressed by counsel in their brief, that it was the duty of the appellees, as members of the board of commissioners, to vote to reject and disallow the claim, and that in voting to allow it, they failed to perform their duties as officers under the law, "in the manner and within the time prescribed by law." Under the statute as it existed when this prosecution was commenced, it may be conceded that the costs of an election for a free gravel road was not a valid and binding claim against the county, for the statute in express terms made the petitioners liable for such costs (§6924 Burns 1894), and hence the board of commissioners were not authorized to allow the claim specified in the indictment. But notwithstanding this, we are inclined to the view that the State has mistaken its remedy, if any, and that the acts charged do not constitute any offense under §2018, *supra*. But if we are wrong in this, the enabling act approved February 24, 1899, relieves the appellees from any criminal liability. That act was amendatory of an act of March 7, 1895 (§6924, *supra*), and section two of the amendatory act (see Acts 1899, pp. 128, 129,

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130), provides: "§2. In all counties in the State of Indiana, wherein the boards of county commissioners have heretofore paid the costs of elections out of any public funds which costs were incurred in holding an election for the construction of a free gravel, stone or macadamized road as provided in the act approved March 7, 1895, the action of said boards of county commissioners in paying all such costs are hereby legalized and made valid."

The amendatory and enabling act just cited contained an emergency clause, and was approved and went into effect February 24, 1899. The indictment was returned December 28, 1898, and on February 27, 1899, the motion to quash was made and sustained. By the enabling act, the payment of the costs of the gravel-road election, which the appellees as a board of commissioners voted to and did allow, was legalized and made valid. It follows, therefore, that when the court below entertained and sustained the motion to quash the indictment, the action of the appellees in voting to allow the claim had been declared legal and valid by the legislature. The trial court correctly sustained the motion to quash.

Judgment affirmed.

BERNHAMER ET AL. v. HOFFMAN.

[No. 2,749. Filed June 15, 1899. Rehearing denied Oct. 10, 1899.]

JUSTICE OF THE PEACE.—*Appeal Bond.—Dismissal of Appeal.—Action on Bond.*—Where an appeal taken from a justice of the peace to the circuit court was dismissed by the appellant, the sureties on the appeal bond are liable in an action thereon, although the complaint shows affirmatively that the justice of the peace had no jurisdiction of the subject-matter of the original action.

From the Marion Superior Court. *Affirmed.*

Edwin P. Ferris, Wm. W. Spencer and W. F. A. Bernhamer, for appellants.

Austin F. Denny, for appellee.

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ROBINSON, J.—The sufficiency of appellee's complaint is the only question presented. The suit is on an appeal bond.

The complaint avers that appellee sued one Arbenz, before a justice of the peace, "for possession" of certain lands, described, and "for damages for the unlawful detention thereof," that he recovered judgment "for the possession of" the lands and a certain sum as "damages for the detention thereof;" that Arbenz appealed to the circuit court and filed an appeal bond, which is set out, with appellants as sureties; that after the appeal was docketed in the circuit court, it was dismissed; that the judgment was never paid, asking for further damages for detention after rendition of judgment. It is argued that the complaint shows on its face that the justice rendering the judgment had no jurisdiction of the subject-matter, and that the judgment was void.

The demurrer, which was for the fifth statutory cause, §342 Burns 1894, §339 Horner 1897, calls in question not only the sufficiency of the facts stated to constitute a cause of action, but also the right of the particular plaintiff to maintain a suit on such cause of action. If the justice had no jurisdiction over the subject-matter of the action, and if appellee had no right to maintain this action, such right is questioned by the demurrer. *Louisville, etc., R. Co. v. Lohges*, 6 Ind. App. 288; *Frazer v. State*, 106 Ind. 471; *Farris v. Jones*, 112 Ind. 498; *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257.

A justice of the peace has jurisdiction in actions for the possession of real estate and damages where the relation of landlord and tenant exists and the action is against a tenant holding over, and in cases of forcible entry and detainer and forcible detainer. §§7106, 7118 Burns 1894, §§5225, 5237 Horner 1897. See, *Burgett v. Bothwell*, 86 Ind. 149; *Kiphart v. Brenneman*, 25 Ind. 152; *Short v. Bridwell*, 15 Ind. 211.

It is well settled that no presumptions are indulged in favor of the jurisdiction of courts of special and limited juris-

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diction, but when it is made to appear that they have acquired jurisdiction, the same presumptions are indulged in favor of their proceedings as in case of courts of general jurisdiction. Presumptions will not be indulged that they have acquired jurisdiction. *Wilkinson v. Moore*, 79 Ind. 397; *Smith v. Clausmeier*, 136 Ind. 105.

Where a justice of the peace has no authority to try a case, an appeal from his judgment can confer no jurisdiction upon the circuit court. *Goodwine v. Barnett*, 2 Ind. App. 16; *Jolly v. Ghering*, 40 Ind. 139; *Nace v. State*, 117 Ind. 114. It is equally well settled that a judgment by a justice in a matter over which he had no jurisdiction is void. *Mays v. Dooley*, 59 Ind. 287; *Horton v. Sawyer*, 59 Ind. 587.

In the case at bar the complaint shows affirmatively that the action before the justice was an action in ejectment. In such a case, a justice has no jurisdiction, and a judgment rendered by him is void. It is true, as argued, that the code abolished certain forms of action and provided for one action in civil cases denominated a civil action. But the term ejectment has been properly retained by the courts to designate one form of action. But whatever designation may be given the cause, it is clear that it was one without the jurisdiction of the justice. We are not concerned with what may affirmatively appear in the record outside of the complaint, and the injunction placed upon the court to disregard an error or defect which does not substantially affect the rights of the adverse party has no application. §401 Burns 1894.

Under the rule laid down in *Hopper v. Lucas*, 86 Ind. 43, if the complaint in the case at bar had contained an averment that the judgment was duly given or made, it would be a sufficient complaint. But the objection to the complaint is, not that it fails to aver sufficient facts to show that the justice had jurisdiction, but that it avers facts which show affirmatively that the justice did not have jurisdiction. In other words, the bond is claimed to be invalid not because of failure to show the justice's authority, but because of the affirma-

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tive showing that he did not have authority. So that the question presented is the validity of a bond, not where there is a failure to show jurisdiction, but where there is a showing of no jurisdiction.

However, one of the methods prescribed for escaping the effects of a void judgment rendered by a justice of the peace is to appeal to the circuit court. The defendant in the justice's court availed himself of this method. It follows that there was a sufficient consideration for the bond. It accomplished the purpose he sought. The bond was conditioned that he would prosecute the appeal to final judgment. This he failed to do by dismissing the appeal. That left the judgment standing in the justice's court. It may be said that had the case been prosecuted in the circuit court it must necessarily have resulted in a dismissal. True, but the circuit court would not have dismissed the appeal but would have dismissed the cause of action. *Goodwine v. Barnett*, 2 Ind. App. 16. After a party has obtained what he sought by an appeal bond, he can not then be heard to say that the bond was never of any effect. There was no error in holding the complaint sufficient.

Judgment affirmed.

PENNSYLVANIA COMPANY v. HUNSLEY.

[No. 2,752. Filed October 11, 1899.]

INSTRUCTIONS.—*Invasion of Province of Jury.—Preponderance of Evidence.—Intelligence of Witness.*—An instruction that "The preponderance of evidence in this case does not depend alone on the number of witnesses who testified for or against the existence of any particular fact or state of facts. In determining upon which side lies the preponderance of evidence, you *should* take into consideration the intelligence and candor of the several witnesses," etc., is an invasion of the province of the jury. pp. 39-50.

INTERROGATORIES TO JURY.—*Railroads.—Damages.—Fires Escaping from Right of Way.*—In an action against a railroad company for damages caused by fire escaping from its right of way, the condition of the right of way was a material fact in the case, and an interrogatory to the jury, asking if there was not a short growth of grass at

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a certain place on the right of way which was not burned over by the fire, should have been submitted. *p. 50.*

EVIDENCE.—Cross-Examination of Witness.—No error was committed in sustaining an objection to a question asked plaintiff on cross-examination, if he would not accept the amount of his demand in settlement of his claim if he could get it. *pp. 50, 51.*

SAME.—Cross-Examination of Witness.—Where, in the trial of an action against a railroad company for damages on account of fire escaping from defendant's right of way, the plaintiff stated on cross-examination that he had another suit pending with his brother against defendant for the same fire, it was proper to ask him the amount of his claim in that case. *p. 51.*

SAME.—Cross-Examination of Witness.—Where a witness admitted on cross-examination that he wanted plaintiff to recover, no error was committed in excluding questions asked him as to whether he wanted other parties, in similar actions against defendant, to recover. *p. 51.*

SAME.—Opinion Evidence.—A witness, who was shown to be a farmer residing in the same county in which plaintiff's land alleged to have been damaged by fire was situated, had passed and repassed the land for about five years, and had been over the land after the fire, was competent to testify as to the value of the land before and after the fire. *p. 51.*

INSTRUCTIONS.—Railroads.—Fires Escaping from Right of Way.—Measure of Damages.—An instruction in the trial of an action against a railroad company for damages caused by fire escaping from its right of way, that "in determining the amount of damages, if any, sustained by the plaintiff, you should be guided by the evidence introduced, and may take into consideration the opinions of the many witnesses as to the value of the land," is not erroneous when considered in connection with another instruction previously given informing the jury that the measure of the damages was the diminution of the market value of the land occasioned by the fire. *pp. 51, 52.*

EVIDENCE.—Depositions.—Opinion Evidence.—Where, in the trial of, an action against a railroad company for damages to plaintiff's land caused by fire escaping from defendant's right of way, the plaintiff offered in evidence certain depositions in which the deponents stated that they owned muck land, similar to plaintiff's, that they had fires on such land, and that fires were a benefit, and not a detriment, the action of the court in refusing to admit the depositions in evidence, on the ground that it was not shown that deponents had seen plaintiff's land, was error. *pp. 52, 53.*

From the St. Joseph Circuit Court. *Reversed.*

Allen Zollars, C. H. Worden and F. E. Zollars, for appellant.

Frank E. Osborn and H. W. Sallwasser, for appellee.

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COMSTOCK, C. J.—The complaint avers in substance that in September, 1895, and prior thereto, appellant railroad extended in an easterly and westerly direction through and across the south part of section ten, township thirty-four north, of range three west, in La Porte county, Indiana; that at said date plaintiff was the owner and in possession of forty acres of land north of said tract; that appellant negligently permitted dry grass, weeds, and other combustible material to accumulate on its right of way, to the north of said railroad track, at a point in the southeast quarter of said section ten, and negligently set fire to the same, and negligently permitted the fire to escape from its right of way to the lands adjoining on the north, and said fire continuously burned over and across to the lands of the plaintiff. The complaint avers that the land was by nature well set in grass and produced large crops thereof annually from the roots remaining in the soil without re-seeding or cultivating. The cause was, upon change of venue, tried in the St. Joseph Circuit Court. A trial by jury resulted in a verdict and judgment in favor of appellee in the sum of \$320. With the general verdict the jury returned answers to interrogatories. The assignment of errors contains but two specifications: (1) That the court erred in overruling appellant's demurrer to the complaint. (2) The court erred in overruling appellant's motion for a new trial. The latter only is discussed. The complaint does not charge any defect in the locomotive from which it is alleged sparks of fire dropped, igniting the combustibles on the right of way, nor in its management. The controlling question, therefore, was whether the fire originated on appellant's right of way.

Appellant's brief calls attention of the court to the fact that a much larger number of witnesses testified that the fire started outside of, than on the right of way; points out contradictions, inconsistencies, and improbabilities in the testimony of the witnesses for appellee, and for reasons stated, that we do not deem it necessary to set out, insists that appel-

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lant's witnesses were entitled to the greater credit. A very careful and complete summary of the testimony is given for the purpose of showing that the verdict of the jury is based upon prejudice and not evidence, and for the further purpose of showing that the court erred in its instructions to the jury, and especially in the giving of the eighth instruction, which is in the following language: "The preponderance of evidence in this case does not depend alone on the number of witnesses who testify for or against the existence of any particular fact, or state of facts. In determining on which side lies the preponderance of evidence, you *should* take into consideration the intelligence and candor of the several witnesses, their opportunities of seeing or hearing the facts about which they testify; their ability to see where the fire originated, whether they were close or far from it, whether they were at or near the railroad when the fire started, or came to it after it had greatly extended; their conduct and demeanor while testifying; their interest in, or disinterestedness, if any, as to the result of this suit, and the probability, or improbability of their several statements, in view of all other facts proved in the case. You should also consider whether any of the witnesses are shown to have some motive for assisting either party, or whether any witness may have been active in hunting up other witnesses or testimony to benefit either party; and having carefully considered all these facts and circumstances, and all the evidence, you will, I trust, render a verdict in accordance with the evidence in the case." Counsel admit that in some cases it might be proper to instruct the jury as a general proposition that the preponderance of the evidence "does not depend upon the number of witnesses;" but when the court, "in view of the overwhelming number of witnesses in behalf of appellant as to the origin of the fire," instructed them that "the preponderance of the evidence in *this case*" does not depend alone upon the number of witnesses, that the court invaded the province of the jury. Counsel contend

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that the court had no right to say as a matter of law, that in this case the preponderance of the evidence does not depend alone upon the number of witnesses. It is claimed that that part of the instruction made a question of fact to be decided by them a question of law declared by the court, and that the jury would understand therefrom that there was good reason, in the opinion of the court, why the jury should not be controlled by the number of witnesses. It is also argued that the court invaded the province of the jury when it instructed them that they should take into consideration the intelligence, etc., of the witnesses. The objection to this part of the instruction was that the word *should* instead of *might* was used, and that, in effect, they were told "that a witness of greater intelligence should be given more credence than one with less intelligence." In support of this objection counsel cite a number of cases decided by our Supreme Court, giving quotations from the instructions involved, and what the court said in relation thereto.

In *Fulwider v. Ingels*, 87 Ind. 414-420, the court below gave the following instruction: "The opinion of witnesses, whose attention has been particularly called to the alleged insane person, who were familiarly acquainted with him, who had frequent opportunities of observing him and the operations of his mind, is ordinarily entitled to greater weight than that of witnesses of equal capacity whose opportunities of forming an opinion were more limited. The facts upon which the opinions of such witnesses are based have been given you, and you should weigh the opinion expressed with the facts testified and stated to you, upon which such witnesses based such opinion."

In speaking of that instruction the court said: "The tenth instruction is also erroneous. It tells the jury in substance, that where witnesses are of equal capacity, the opinions of those who have better means of knowledge are ordinarily of greater weight than the opinions of those who have less means of knowledge; but this leaves out of view the essential

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element of credibility, and, even if true in fact, it is not a presumption of law. It has been often held to be error to state to a jury, as a legal proposition, matter which, although true in point of fact, and therefore belonging exclusively to the jury, does not amount to a legal presumption. Thus it has been held error to instruct a jury that, other things being equal, oral testimony is entitled to greater weight than depositions. *Millner v. Elgin*, 64 Ind. 197, 31 Am. Rep. 121; *Works v. Sterens*, 76 Ind. 181. So it has been held error to instruct a jury that 'one interested will not, usually, be as honest and candid as one not so;' *Greer v. State*, 53 Ind. 420; *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44; or that, if a person once knows a thing he is presumed to remember it; *Hinds v. Harbou*, 58 Ind. 121; or that, if a witness is interested in the result of a prosecution it tends to discredit him; *Pratt v. State*, 56 Ind. 179; or that the evidence of parties to the action and those related to them is not entitled to as much weight as the evidence of disinterested witnesses; *Nelson v. Vorce*, 55 Ind. 455; or to institute a comparison between the weight of the evidence of different witnesses; *Nelson v. Vorce*, *supra*; *Cunningham v. State*, 65 Ind. 377; *Wood v. Deutchman*, 75 Ind. 148. The court in the tenth instruction did not merely tell the jury that the matters alluded to were matters which they had a right to consider and judge for themselves in determining the question as to the relative weight of the opinions of witnesses; to this there could have been no objection; *Pratt v. State*, *supra*; but the court went further, and told the jury how to determine the question, and so the court violated the principle of the foregoing decisions, and usurped the province of the jury."

In *Woollen v. Whitacre*, 91 Ind. 502, 503, the court was requested to instruct the jury in relation to the testimony of one of the interested parties, as follows: "But you have the right, and it is your duty, to take into consideration that interest, together with his manner of testifying, and the consistency or inconsistency of his statements, if any; also, what

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contradictory statements, if any, he may have made in relation to the matter in suit." In speaking of that part of the instruction so refused, the court said: "Indeed, that part of the charge requested, and refused, told the jury, in substance, that it was their duty to consider, among other things, the interest of a witness. If it be true, as a matter of law, that it is the duty of the jury to consider the interest of a witness in determining his credibility, then it would seem also to be their duty, as a matter of law, to give less weight to the testimony of a witness having an interest in the result of a suit than to that of one having no interest. However this may be as a matter of fact, it is not so as a matter of law. The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness' testimony. The court may properly say to the jury that, in considering the credibility of a witness, certain things may be considered by them; but it is error for the court to inform the jury, directly or indirectly, that such things must, as a matter of law, be regarded in determining the question of credibility. Whenever the court does so, it invades the province of the jury."

In *Shorb v. Kinzie*, 100 Ind. 429, the court instructed the jury as follows: "There has been some evidence given of admissions by the plaintiff, and upon this branch of the case the law is that verbal admissions or statements, consisting of mere repetitions of oral statements made some time ago, are subject to much imperfection and mistake, for the reason that the party making them may not have expressed his or her own meaning, or the witness may have misunderstood him or her, or, by not giving their exact language, may have changed the meaning of what was said. Such evidence should, therefore, be received by the jury with great caution. But admissions deliberately made and well understood are entitled to your consideration, especially when made against a party's own interest. The jury are the exclusive

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judges of the weight of the evidence." In relation to that instruction, the court said: "Under *Newman v. Hazelrigg*, 96 Ind. 73, *Finch v. Bergins*, 89 Ind. 360, *Garfield v. State*, 74 Ind. 60, *Davis v. Hardy*, 76 Ind. 272, we think this instruction must be held erroneous. The last sentence in the instruction does not save the entire instruction from error. It did not withdraw the preceding matter, often held by this court to be objectionable, but left it to control the judgment of the jury."

In *Cline v. Lindsey*, 110 Ind. 337, this instruction was given: "20th. In weighing the testimony of witnesses, the jury should consider their capacity to understand the facts about which they testify, their opportunity of knowing the mental condition of the testator. The testimony of the testator's neighbors who have long been acquainted with him, and have had frequent intercourse with him, and whose attention has been particularly called to the testator, who have had frequent opportunities of observing his mind, is entitled to greater weight than that of a witness of equal sagacity, whose opportunities were more limited, etc." The objection made to this instruction was, that the court thereby invaded the province of the jury, by charging that the testimony of the testator's neighbors who had long been acquainted with him, etc., was entitled to more weight than the testimony of other witnesses of equal sagacity, whose opportunities had been more limited. In relation to the instruction, and the contention against it, the court said: "Considered without reference to any other charge that may have been given, the above instruction, in our judgment, is open to the objection urged against it. It may be true, as a matter of fact, that the testimony of the neighbors of the testator, who had the advantages and opportunities named, was entitled to more weight than the testimony of other witnesses of equal sagacity, who had less opportunities, because of less acquaintance with the testator; but that was a fact to be determined by the jury, and not by the court as a question of

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law. * * * [page 340] In all such cases it is for the jury to determine for themselves to what witnesses they will give the most credence. They have a right to consider the fact that some of the witnesses may have had greater opportunities than others. The court may instruct them that they have such right, but it ought not to invade their province and undertake to determine for them what witness is most reliable."

In *Jones v. Casler*, 139 Ind. 382, the following instruction was given: "I instruct you that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior; and, also, to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or a want of recollection." In speaking of that instruction the court said: "The weight to be given to the testimony of any witness or class of witnesses is always a question for the jury and it is never proper to charge the jury, as a matter of law, that any witness or class of witnesses shall be received with greater consideration than any other."

In *Durham v. Smith*, 120 Ind. 463, the ruling of the court is correctly stated in the syllabus, as follows: "Where a jury is charged that witnesses residing near the testatrix, being more intimate with her, and having better opportunities of observation than those living farther away, other things being equal, are entitled to greater credit, the instruction is erroneous, as an invasion of the province of the jury."

In *Dodd v. Moore*, 91 Ind. 522, one of the instructions was as follows: "The weight which you give the testimony of a witness depends upon the interest which such witness may have in the result of your verdict. You therefore give such effect and force to the testimony of the plaintiff and defendant as you think would be proper in view of what may be at stake to the plaintiff and to the defendant respectively." In speaking of that instruction, the court

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said: "The jury have the right, in all cases, in weighing and settling conflicts in testimony, to consider the interest which the witnesses may have in the result of the litigation; and it is proper to instruct them that they may exercise that right. It may be that in many cases witnesses unconsciously warp and color their testimony by reason of interest; and it may be that, in many instances, witnesses purposely falsify by reason of such interest; but whether such is the fact, in any given case, is a question of fact to be left to the jury. Surely, the courts cannot say, as a matter of law, that because a witness may have an interest in the litigation, less weight should be given to his testimony. In the instruction above set out, the province of the jury is invaded, and they are instructed, in effect, that, as a matter of law, less weight should be given the testimony of the parties, because they are interested in the result of the litigation."

In *Duvall v. Kenton*, 127 Ind. 178, one of the instructions was as follows: "The opinions of experts are received in evidence, and may be considered and weighed from a consideration of the skill of such experts and the truth of the hypothesis on which his opinion is based. The jury in judging of the weight of expert evidence should consider the character of the witness and the interest, if any, he has in the case." In relation to that instruction the court said: "Instructions of this character have often been adjudged by this court to be erroneous. * * * In the case of *Unruh v. State*, 105 Ind. 117, the instruction was as follows: 'The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally.' The court said of this instruction: 'It very clearly discredits the parties named, because they are interested in the event of the suit. The charge is, that it was the duty of the jury to consider the fact that the parties named were interested in the event of the suit. The jury

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would not understand that on account of that interest greater weight was to be given to the testimony of interested parties. Very clearly, they understood that they were to give less weight to that testimony.' The jury are exclusive judges of the weight to be given to the testimony of any witness, and an instruction which hampers them in the exercise of their duty in that respect is erroneous."

In *Newman v. Hazelrigg*, 96 Ind. 73, an instruction that it was the duty of the jury to consider evidence of verbal admissions with caution was held to be erroneous.

In *Hartford v. State*, 96 Ind. 461, 466, 49 Am. Rep. 185, the court instructed the jury that in weighing the testimony of the defendant, it was their duty to take into consideration the fact that he was defendant. That instruction was held to be erroneous. Amongst other things the court said: "If it was the duty of the jury, as a matter of law, to consider the fact that the appellant was the defendant, in weighing his evidence, then it would seem to follow that, as a matter of law, his evidence was entitled to less weight on account of the fact referred to. *Woollen v. Whitacre*, 91 Ind. 502. The charge clearly conveyed the idea that as a leading rule of evidence the testimony of the appellant was not entitled to as much weight as that of other witnesses, unless, after considering the fact of his being the defendant, they were still able to give him credit. In other words, the jury must have understood that the fact of the appellant being the defendant cast suspicion upon his evidence, entitling it to less weight than it would have been entitled to if he had been a disinterested witness. * * * The jury both in criminal and civil cases are the exclusive judges of the evidence. In this they must be left untrammelled by the court's charges. If there is conflict in the evidence, the court may inform them that, as a matter of fact, they may consider the interest of a witness in determining his credibility, but it is error to tell them that such interest must, as a matter of law, be considered. It was said, in *Woollen v. Whitacre*, *supra*: 'The

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court may properly say to the jury that, in considering the credibility of a witness, certain things may be considered by them, but it is error for the court to inform the jury, directly or indirectly, that such things must, as a matter of law, be regarded in determining the question of credibility. Whenever the court does so, it invades the province of the jury." See, also, *Nelson v. Vorce*, 55 Ind. 455; *Hinds v. Harbou*, 58 Ind. 121; *Pratt v. State*, 56 Ind. 179; *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44; *Greer v. State*, 53 Ind. 420; *Millner v. Elgin*, 64 Ind. 197, 31 Am. Rep. 121; *Works v. Stevens*, 76 Ind. 181; *Voss v. Prier*, 71 Ind. 128.

In *Unruh v. State*, 105 Ind. 117, 124, one of the instructions was as follows: "The jury are the judges of the credibility of the witnesses, and in determining the weight to be given to the testimony of the different witnesses, you should consider the relationship of the witnesses to the parties, their interest in the event of the suit, etc." In relation to that instruction, the court said: "Here again, it is enjoined upon the jury as a duty, in determining the credibility of witnesses, to consider their interest in the event of the suit, and their relationship to the parties. And here again, by the phraseology of the instruction, discredit is thrown upon the classes of witnesses named. * * * The jury had a right to consider that relationship, if they thought it worthy of consideration, and might have been instructed as to that right, but to enjoin it as a duty, implied infirmity in the testimony by reason of the relationship. In these instructions, the court not only invaded the province of the jury, but indicated to them that, as a matter of law, the testimony of some of the witnesses was entitled to less credence than the testimony of others. For these reasons the judgment must be reversed."

In *Finch v. Bergins*, 89 Ind. 360, the court instructed the jury that evidence as to verbal admissions ought to be received with great caution; that such evidence is subject to much imperfection and mistake. That instruction was held

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to be erroneous, for the reason that it invaded the province of the jury. The same ruling was made in *Lewis v. Christie*, 99 Ind. 377.

In *Bird v. State*, 107 Ind. 154, the jury were instructed as follows: "The defendant has testified in his own behalf. In weighing his testimony the fact that he is the defendant, and, therefore, deeply interested in the result of the prosecution, should not be overlooked, but it does not follow that because of his interest you should disregard his testimony or refuse to give him credit. Innocent men are sometimes charged with the commission of grave offenses. If the defendant's testimony, when compared with all the other facts and circumstances in evidence, is consistent and harmonious, it may have a controlling weight in deciding the case, but the weight it shall have is a matter left wholly to your consideration and judgment." In relation to that instruction, the court said: "This instruction cannot be sustained. Very clearly it discredits the testimony of appellant. It is equivalent to telling the jury that it was their duty to keep in mind the fact that appellant was the defendant, and that his testimony, for that reason, could not be taken as of controlling weight, unless consistent with all the facts and circumstances in the evidence. * * * It is true, the jury were also instructed that they were the judges of the credibility of the witnesses, including appellant, but, as to him, that must be limited by the portions of the sixth instruction above commented upon. From them, the jury would understand, that while they might judge of his credibility, it was under the injunction to keep in mind that he was the defendant and 'deeply interested in the result of the prosecution,' and that his evidence could not be of controlling weight in the decision of the case, unless consistent with the facts and circumstances in evidence against him. That appellant was an interested party is a fact that the jury might consider in weighing his testimony, and it would have been proper to instruct them

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that they might exercise that right, but it was not proper to so instruct them as to impose a consideration of his interest as a duty, and thereby cast discredit upon his testimony in advance, and to destroy the controlling effect of his testimony in advance, unless it should be consistent with the testimony against him." See, also, *Morris v. State*, 101 Ind. 560; *Canada v. Curry*, 73 Ind. 246, 252; *Moore v. State*, 85 Ind. 90; *Long v. State*, 23 Neb. 33, 36 N. W. 310; *Johnson v. People*, 140 Ill. 350, 29 N. E. 895; *McMinn v. Whelan*, 27 Cal. 300. Judged by the foregoing decisions, this instruction must be held bad. Nor can we say in view of the evidence that this error did no harm.

The fourth reason for a new trial is based upon the refusal of the court to submit to the jury interrogatory thirty-two, as follows: "Was there a short and green growth of grass upon the right of way extending from the line of the old fence post on the north to the bank or fill of the railroad which was not burned over by the fire on the 20th day of September, 1895?" There was evidence that at the time of the fire the right of way from the tract to the fence post on the north was covered with a short growth of green grass, in which fire did not burn on the day appellee's property was injured. As the condition of the right of way was a material fact in the case, the interrogatory should have been submitted. §546 Horner 1897.

Appellant propounded to appellee upon cross-examination the following question: "You demand \$500. Would you take that if you could get it?" To which question the court sustained an objection. This is the twenty-eighth reason given for a new trial; in this there is no error. The sustaining of an objection propounded to the same witness is made the twenty-ninth ground for a new trial. Appellee in answer to an interrogatory on cross-examination stated that he had another suit pending with his brother John against appellant for the same fire. "There you ask \$1,500?" This question was proper. The answer would have shown the ex-

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tent of his interest; an interest not limited to the amount involved in the trial in progress.

Appellant propounded upon cross-examination to Louis Lapp the following questions: "You want John Hunsley to get some money out of the railroad company, don't you?" "Don't you want Goff and Glang to recover against the Pennsylvania Company?" "And don't you want them to recover so that if you ever have a fire on your mother's land she may recover also?" The exclusion of these questions constitutes the thirtieth, thirty-first, and thirty-third reasons for a new trial. The witness had already stated in answer to a question of appellee, that he wanted William Hunsley to get money out of the railroad company because he thought he deserved it. The witness having admitted his interest in the success of the plaintiff, the court did not err in excluding these questions.

The thirty-seventh, thirty-eighth, and thirty-ninth reasons for a new trial are based upon the ruling of the court in allowing Ira G. Sparks, a witness for appellee, to testify as to the value of appellee's land before and after the fire. It is claimed that this witness had not shown himself qualified to testify. The witness testified that he was a farmer, owner of real estate, and residing in La Porte county, Indiana; that he knew the forty acre tract of land of appellee; that he had passed and repassed it along the road for about five years; that he had been over the land after the fire. The exception was not well taken. The value of his testimony depended upon his knowledge of the land, but we are clearly of the opinion that he showed himself possessed of knowledge qualifying him to give an opinion.

Nor did the court err in the seventh instruction read in connection with the sixth to which counsel refers in this connection, which instruction is in the following language: "In determining the amount of damages, if any, sustained by the plaintiff you should be guided by the evidence introduced, and may take into consideration the opinions of the many witnesses as to the value of the land." The sixth

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instruction is as follows: "The measure of damages is the diminution of the market value of the land occasioned by the fire; that is to say, the difference between the value of the land immediately before and immediately after the fire."

The sixty-first and sixty-second reasons are for the refusal of the court to permit appellant to read the depositions, respectively, of Isaac B. Suman and Samuel C. Hackett. These depositions were offered for the purpose of showing that the burning of muck lands is a benefit, and not a damage. Appellee's land was shown to be muck land, composed of decayed vegetables and roots. The deponents, in these depositions, stated that they had seen and owned muck land composed of decayed vegetables and roots; that they had fires on the land; that they were a benefit, and not a detriment.

We are informed by appellant's brief (appellee has not favored us with a brief) that the depositions were rejected because it was not shown that the deponents had seen appellee's land. These witnesses were offered as experts; they stated the facts upon which they gave their opinions, and then gave their opinions as the result of their knowledge by experience and observation. We are of the opinion that this ruling was error.

Mr. Abbott, in his work on Trial Evidence, at page 311, says: "After the qualities or grade on which the value depends have been proved, a witness qualified by special experience or knowledge to testify to the intrinsic value of the particular article, or to the market price of such articles (as the case may require), may testify to its value, although he has not seen the article. Such testimony may be founded on the witness having heard or read all the testimony which has been given by the party on the facts of quality, grade, etc., on which value or price depends; in which case the question may be: 'Assuming that the goods were as described by plaintiff (or other testimony heard or read by the

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witness), what were they worth?" Or it may be called forth by a hypothetical question, embracing all the same facts which may fairly be assumed to be sufficiently in evidence."

Counsel also argue that instructions numbered four, five, and eighteen, given to the jury, are erroneous. We have examined them with care, and the authorities cited in reference thereto. While we are inclined to the opinion that they did not mislead the jury, they are justly open to criticism, but their faults are not likely to re-appear upon a second trial, and to discuss them would unduly extend the length of this opinion. For the same reason we do not pass upon other alleged errors.

Judgment reversed, with instruction to the trial court to sustain the motion for a new trial.

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[No. 2,870. Filed October 11, 1899.]

PROCESS.—Service on Insurance Company.—Return.—The return of the sheriff to a summons directing service upon a domestic insurance company of a named city, showing that he had served the summons by handing it to defendant's agent in the county in which the suit was brought, neither the president nor chief officers of the company being found in the county, and that the agent examined it, and advised him to send it to the general agent in another county, is sufficient within the meaning of §§316, 318, 319 Burns 1894. *pp. 54, 55.*

PLEADING.—Condition Precedent.—Insurance.—A complaint in an action on a fire insurance policy which avers that the plaintiff has duly and fully performed all of the conditions of the policy on his part to be performed, sufficiently avers the performance of the conditions precedent contained in the policy, within the meaning of §373 Burns 1894, which provides, that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege, generally, that the party performed all of the conditions on his part. *pp. 55, 56.*

INSURANCE.—Proof of Loss.—Action.—Where a fire insurance policy requires that proof of loss shall be made by the insured within a given time, and the insured makes the proof of loss required, and no objection is made thereto within the time stipulated, and the loss is not paid, so far as ascertaining the amount of loss is concerned, a right of action accrues on the policy. *p. 56.*

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PLEADING.—*Suit Brought in Wrong County.*—An objection that the action was brought in the wrong county must be raised by answer, where such fact does not appear on the face of the complaint. *pp. 56-58.*

SAME.—*Plea in Abatement.*—Where it does not appear in the complaint that there was no jurisdiction of the person, an objection on that ground, by plea in abatement, after an appearance and demurrer, comes too late. *p. 58.*

SAME.—*Proof of Loss.—Waiver.*—Where specific objections are made by an insurance company to proofs of loss furnished it by insured, any other objections, which, if made, could have been readily met, are waived. *pp. 58, 59.*

SAME.—*Proof of Loss.—Waiver.*—Where an insurance company is dissatisfied with the proofs of loss furnished, it should make the fact known to the insured without unnecessary delay, and specify its objections so that they may be corrected; and a failure in this respect amounts to a waiver of further proofs. *pp. 59-61.*

SAME.—*Instructions.—Waiver.—Pleading.*—Where in an action on a fire insurance policy the issue of waiver was not presented by the pleadings, it was error for the court to instruct the jury that plaintiff must either show a performance of the conditions of the contract on his part to be performed, or show that defendant had waived the performance of such conditions. *pp. 61-64.*

From the Montgomery Circuit Court. *Reversed.*

M. A. Morrison, V. G. Clifford, W. F. Browder and W. S. Moffett, for appellant.

Palmer & Palmer, for appellee.

ROBINSON, J.—Appellee recovered a judgment against appellant for a fire loss. The complaint avers that appellant, "The Fort Wayne Insurance Company, of Fort Wayne, Indiana," is a "corporation duly organized under the laws of Indiana, and doing a fire insurance business in said state;" that the company has an office and an agent for the transaction of business residing in Clinton county and upon whom process may be served. The complaint was filed in the Clinton Circuit Court.

The first error assigned questions the overruling of appellant's motion to set aside service of process. The amended return of the sheriff to the summons issued shows: "Served the within summons as commanded on the defendant, The

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Fort Wayne Insurance Company, of Fort Wayne, Indiana, on the 26th day of October, 1896, by handing said summons to John C. Morrison, agent of said defendant, residing in Clinton county, Indiana, and that the said Morrison looked at the same and advised the undersigned to send said summons to Messrs. McGilliard & Dark, the general agents of the defendant residing at Indianapolis, Indiana; neither the president nor chief officers of defendant corporation was found in my county." The sheriff was directed to summon "The Fort Wayne Insurance Company, of Fort Wayne, Indiana."

Section 318 Burns 1894, provides that process against either a domestic or foreign corporation may be served on the president, presiding officer, chairman of the board of trustees, or other chief officer, or if its chief officer is not found in the county, then upon its cashier, treasurer, director, secretary, clerk, general or special agent.

Appellant entered a special appearance and moved to set aside the service of summons. The motion to set aside the service was properly overruled. Strictly speaking, perhaps, the summons was not served by reading or by leaving a copy at the usual and last place of residence. But the party served did receive the summons and knew what it contained. He evidently read it, and from the direction given by him he knew the action had been brought, the parties thereto, and the court where pending. §§316, 319 Burns 1894.

The second, third, and tenth errors assigned question the sufficiency of the complaint. The complaint is in the usual form in such cases, and the only objection to it argued is that it fails to aver a performance of the conditions precedent contained in the policy, or show a waiver. The complaint avers that "the plaintiff has duly and fully performed all the conditions of said policy on her part to be performed." The statute, §373 Burns 1894, provides that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege, generally, that the party performed all the conditions on his part. It has been held that this section

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applies to insurance policies the same as to other contracts. *Louisville, etc., Co. v. Darland*, 123 Ind. 544, 7 L. R. A. 899. The policy is made a part of the complaint. It contains certain provisions as to how the value of the property at the time of a loss shall be ascertained or estimated. The policy also requires that proof of loss shall be made by the insured within a given time. The complaint shows this was done. We think a proper construction of the policy is that the owner shall make proof of his loss within a given time, and if that proof is not satisfactory to the company it may take steps to have the loss ascertained by appraisers. If the insured makes the proof of loss required and no objection is made to such proof within the sixty days stipulated in the policy, or the policy is not paid, so far as ascertaining the amount of loss is concerned, a right of action accrues. We do not think the complaint open to the objection urged.

Sustaining appellee's demurrer to the second and additional paragraph of answer in abatement is appellant's fourth assignment of error. Appellant filed a verified second paragraph of answer in abatement, alleging in substance that appellant is a corporation created by act of the General Assembly of the State of Indiana, with its home office at Ft. Wayne, Indiana, and that it is and has been for more than four years a resident of Allen county, Indiana; that appellant's general agent is a resident of Marion county, Indiana, and has been since its incorporation, and has never had a residence elsewhere, and that such general agent has its office at Indianapolis, in Marion county; that neither appellant nor such general agent is or ever has been a resident of Clinton county, Indiana, and that no officer of appellant or of such general agent is or ever has been a resident of Clinton county; that when the policy in suit was executed appellant had an agent in Carroll county, Indiana, who resided and maintained his office there, and that such agent at no time resided or had an office in Clinton county; that all negotiations relating to the issuance of the policy sued on were had by and

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through such agent and such agency in Carroll county, and that no agent of appellant residing in Clinton county had anything to do with issuing the policy, that appellee's cause of action is not connected with and does not grow out of the business of any office or agency of appellant in Clinton county; wherefore, it is asked, that the action abate. This answer is good in abatement and the demurrer should have been overruled, unless, as argued by appellee, the question was waived by appellant taking other steps in defense of the action before pleading to the jurisdiction. The transcript shows that appellant first demurred to the complaint for want of facts, which was overruled. Some days afterward appellant asked and secured an order requiring appellee to submit herself to an examination touching matters averred in her complaint. Afterwards appellant filed a plea in abatement alleging facts going to show the suit was prematurely brought. A demurrer was sustained to this, and an amended answer filed. Before the court ruled on the demurrer to this amended answer, appellant filed its additional paragraph of answer in abatement which is above set out. The court then overruled the demurrer to the amended answer in abatement, and sustained the demurrer to the additional answer in abatement.

It does not appear on the face of the complaint that the action was brought in the wrong county, and in such case the objection must be raised by answer. *Eel River R. Co. v. State*, 143 Ind. 231; *Globe, etc., Ins. Co. v. Reid*, 19 Ind. App. 203. The complaint discloses that the subject-matter of the action is within the ordinary jurisdiction of the circuit court. The statute provides that the objection that the action was brought in the wrong county, if not taken by answer or demurrer, shall be deemed to have been waived. §346 Burns 1894. In *Indiana, etc., R. Co. v. Searce*, 23 Ind. 223, it was held that when a demurrer was sustained, judgment, appeal, reversal, and the cause certified back, it was too late to plead in abatement going only to the jurisdiction

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of the court over the person of the defendant. In *Bauer v. Sampson Lodge*, 102 Ind. 262, it is held that a demurrer does not cut off the right to plead in abatement, contesting the plaintiff's right to maintain the action. But this rule does not apply where the plea questions jurisdiction of the person. In such cases it is held that a plea questioning jurisdiction over the person will not be entertained after demurrer to the complaint. *Slauter v. Hollowell*, 90 Ind. 286; *Singleton v. O'Blenis*, 125 Ind. 151.

In the case at bar as it does not appear in the complaint that there was no jurisdiction of the person, an objection on that ground, by plea in abatement, after an appearance and demurrer, came too late.

The fifth assignment of error is overruling the demurrer to appellee's reply to appellant's amended answer in abatement, and the sixth, overruling the motion for a new trial on the issues joined on the amended answer in abatement. These may be considered together. The amended answer in abatement alleged in substance that the first proofs of loss did not comply with the policy, that demand was made for additional proofs, that additional proofs were furnished in response to such demand and that suit was brought within sixty days after the additional proofs were furnished.

The reply alleges that on August 20th proofs of loss were furnished which were verified by appellee's husband who was at the time of the fire and many years previous her agent in charge of the stock of goods, and had knowledge of the same, that he verified the proofs for her and in her behalf; that on October 2nd appellant addressed to her a letter, which she received October 3rd demanding "Proofs according to the contract," and on October 5th she furnished appellant a written instrument as additional proof which was verified by her, but she alleges that the proofs August 20th complied with the provisions of the policy, which are specified; that such proofs were satisfactory to appellant who made no objection thereto until forty-three days thereafter, and after sixty days from the time of the fire had expired,

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the time within which, by the terms of the policy, the proofs had to be made, which appellee did; that the loss occurred July 17th. Trial was had on the issues formed on this plea.

The policy provides that in case of fire the insured shall give the company immediate notice in writing, and within sixty days after the fire, unless such time is extended in writing by the company, the insured shall render a statement to the company verified by the insured stating certain specified facts. The affidavit of the husband attached to the proofs of loss states that the policy was originally issued to him, and with the consent of the company was assigned to appellee; that at the time of the fire he was her agent, and had control of the stock of goods, and that as her agent, and on her behalf, he made the affidavit. The evidence shows that these proofs were received by the company, and that afterwards, on October 2nd, a letter, signed by the company, its general agents and its adjuster, was received by the insured, taking exceptions to the proof furnished, and demanding a statement and invoice of stock covering original purchase by the husband, which was purchased with the means furnished by appellee, also duplicate bills of purchase since original purchase by husband with appellee's means and afterwards transferred into appellee's name; and that appellee had furnished no proofs of loss according to the conditions of the contract as expressed in the policy and demanded and awaited the completion of the papers as per the contract. This letter could not be construed as making any objections to the proof furnished because verified by the agent of the insured. In response to the company's letter, on October 5th, appellee made an affidavit that she was the holder of the policy, which was assigned to her by her husband; that at the time of the fire, and prior thereto, her husband as her agent had charge of the stock, had knowledge of it and was acquainted with it, while her own knowledge was imperfect and limited; that her husband made the proofs under her authority and by her direction, and that they were correct as she believed.

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It appears that the proofs first furnished were received and retained by appellant, and thus treated as satisfactory, until the expiration of the time allowed by the policy for furnishing proofs. The act of appellee in making the affidavit did not affect the original proofs of loss in any way. The only effect her affidavit could have was to supply the defect, if defect it was, growing out of her failure to make the original affidavit, and as no objection was made on that ground, that was waived. Thus it is said: "It is to be observed, that it is the duty of the insurers, pending the consideration of the proofs of loss, to bear themselves with all good faith towards the claimant, and if they are dissatisfied with the proof furnished, and have, or have not, the right to demand further proof before their liability becomes fixed, they ought to make known to the assured the fact and the nature of these demands without unnecessary delay. Otherwise they will be held to have waived their rights in this regard." *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103. In May on Insurance, §468, it is said: "If the insurers intend to insist upon defects in the preliminary proof, they should indicate their intention in such a way that the insured may not be deceived into a false security, and at such time that he shall have opportunity to supply the defects."

Counsel for appellant cite the cases of *Kimball v. Hamilton, etc., Ins. Co.*, 8 Bosworth (N. Y.), 495, and *German American Ins. Co. v. Hocking*, 115 Pa. St. 398, 8 Atl. 586. In the first of these cases there was evidence that the insured was told, when he handed in his proofs, that they were worthless; and the case holds that when the company tells the insured that his papers are no proofs and refers him to the policy, it is not bound to go further and specify the defects. In the Pennsylvania case the loss was payable sixty days after proofs; the next day after the loss the company received notice of a total loss; proofs of loss were not made until March 28th, and it was held that suit brought April 17th was premature.

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In the case at bar the proofs complied substantially with the requirements of the policy except the verification, and no objection was made in that regard. We think the rule is established in this jurisdiction that when objections are made, any other objection, which if made could have been readily met, is waived. *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47, and cases cited. In a case like that at bar if the company is dissatisfied with the proofs furnished, it should make that fact known to the insured without unnecessary delay and specify its objections so that they may be corrected in due time. A failure in this respect is a waiver of further proofs.

Overruling appellant's motion for a new trial of the issues joined on the merits is discussed under the seventh, eighth, and ninth assignments of error. Appellant answered in fourteen paragraphs. First, general denial. The second, third, fourth, and fourteenth went out on demurrer. The fifth paragraph pleaded a violation of the policy by keeping kerosene in stock in excess of five barrels without appellant's knowledge or consent. The sixth paragraph alleged that at the time of the loss appellee kept in the building certain prohibited articles, benzole, benzine, dynamite, and others named, without appellant's knowledge or consent. The seventh paragraph pleads an increase in the risk by certain negligent conduct in permitting pipes used to convey gas into the building for lighting purposes to become defective from which gas escaped and through negligence of appellee's agent set fire to the building. The eighth paragraph defends on the ground that appellee generated in the building illuminating gas for use therein contrary to the terms of the policy. The ninth paragraph pleads an avoidance of the policy by appellee using the building for manufacturing purposes and operating the same later than a named hour. The tenth paragraph alleges that in the pretended proofs of loss furnished by appellee she represented the stock of goods to be worth largely in excess of their value; that the itemized

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statements in the proofs of loss were false and fraudulent, and were made by appellee's agent for the fraudulent purpose of inducing appellant to pay for the loss of goods not in stock; that such false itemized statement was verified by appellee's agent, and that by reason of such false swearing the policy was avoided. The eleventh paragraph pleaded as partial answer that at the time of the fire there was concurrent insurance in another company on the same property for the same period, terms and amounts, and if appellant is liable its liability is limited to one-half the loss. The twelfth and thirteenth paragraphs were addressed to a part of the complaint which was withdrawn by appellee.

Appellee replied in general denial to each affirmative paragraph of answer, except the eleventh. The reply to the eleventh paragraph admits the concurrent insurance and alleges her loss was in excess of the amount of insurance named in both policies.

The sixth paragraph of answer alleged an avoidance of the policy by appellee in having in stock at the time of the loss certain articles, among them, benzine, prohibited by the policy. The evidence shows that the stock of goods was entirely destroyed. The proofs of loss consisted of an inventory taken July 20-23, 1895, prior to the execution of the policy in October following, and also of purchases down to the time of the fire. The evidence showed that sales had been made from the stock during that time. The inventory shows a small quantity of benzine. If it was there when the policy was issued it was part of the stock. There is no direct evidence that the stock contained any benzine when burned. The witness who made the proofs testified he used the old inventories. The burden was on appellant to show that the stock contained benzine when burned. From all the evidence the jury might conclude that appellant had failed to establish this fact. True, appellee, through her agent, made affidavit that the goods named in the inventory were destroyed, and it is argued that as the

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evidence shows that some of the goods were not in the stock as sworn to and were known not to be there when the proofs were executed, the policy was avoided by misrepresentation of facts and false swearing, as alleged in the tenth paragraph of answer. Such statements would defeat a recovery if made for the purpose of deceiving the company, but whether they were so made and were such as were calculated to deceive the company was a question of fact. There is some evidence that appellant, before proofs were made, had access to the inventories, books, and papers of appellee and had examined them and had taken an abstract of them. The insured in such cases, in complying with conditions precedent, is required to use an honest effort and give as full and complete an inventory of the property as the nature of the case will admit. The question was submitted to a jury by a proper instruction.

The jury were told in an instruction that appellee was not permitted to keep certain named articles unless they found from the evidence that some one or more were kept in very small quantities as part of the drug line insured and they were in and formed a part of the property included in the policy, and were simply kept as medicines and in so small a quantity that no risk was run, in that case the policy would not be forfeited, otherwise it would. We fail to find any evidence upon which to base one clause of this instruction, but we can not say that such error should reverse the case.

In the second instruction given the jury they were told that before appellee could recover she must show by a preponderance of the evidence that she had performed all the conditions in the contract to be performed by her unless it was shown that appellant had waived some condition, and in that case appellee would not be required either to perform such condition, or to prove that she had performed such condition waived by appellant. Other instructions given contain statements on the question of waiver of conditions precedent. It is argued that these instructions are erroneous

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because appellee stood upon averments of performance only, and had nowhere averred waiver.

The complaint contains the averment that appellee had performed all the conditions of the policy on her part to be performed. It does not attempt to plead a waiver by appellant of any conditions precedent. It averred performance only. The issue of a waiver of any condition precedent was not presented by any pleading. To each of the special answers appellee replied in denial, except the eleventh and it was not attempted to avoid that answer by any plea of waiver. No attempt was made to avoid any of the affirmative answers by a plea of waiver. It has been held that the general denial does not tender an issue of waiver. *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 10 L. R. A. 843; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198. As the issue of waiver was not presented by the pleadings, it was error for the court to instruct the jury that appellee must either show a performance of the conditions of the contract on her part to be performed, or show that appellant had waived the performance of such conditions. As we have seen upon the trial of the issues presented by the plea in abatement, the question of waiver was presented by the pleadings, but at the trial upon the merits no such issue was pleaded. The motion for a new trial should have been sustained.

Judgment reversed.

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[No. 3,072. Filed October 11, 1899.]

CRIMINAL LAW.—Affidavit.—Evidence.—Variance.—Assault and Battery.—A variance in the affidavit and evidence in a prosecution for an assault and battery as to the initial letter of the middle name of the person on whom the offense was committed is not fatal.

From the Fountain Circuit Court. *Affirmed.*

C. M. McCabe and *A. H. Lindley*, for appellant.

W. L. Taylor, Attorney-General, and *Merrill Moores* for State.

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BLACK, J.—On appeal from a justice of the peace, the appellant was convicted upon a charge of assault and battery. In the affidavit upon which the prosecution was based, the offense was alleged as having been committed upon the person of William T. Parker, while the evidence showed his name to be William P. Parker. The claim advanced by counsel for the appellant that this was a fatal variance cannot be sustained. The contrary view is abundantly established. *Foltz v. State*, 33 Ind. 215; *Choen v. State*, 52 Ind. 347, 21 Am. Rep. 179; *Gordon v. State*, 59 Ind. 75; *Miller v. State*, 69 Ind. 284; *O'Connor v. State*, 97 Ind. 104; *Mergentheim v. State*, 107 Ind. 567; *Ross v. State*, 116 Ind. 495.

The judgment is affirmed.

BECKETT v. LITTLE, ADMINISTRATOR.

[No. 2,876. Filed October 13, 1899.]

PLEADING.—Practice.—Harmless Error.—Available error cannot be predicated upon the action of the court in overruling a demurrer to a bad reply, where the answer to which it was addressed was also bad. *pp.* 67, 68.

SAME.—Partnership.—Decedents' Estates.—In an action on a promissory note brought by the administrator of a deceased partner against a surviving partner, an answer charging that defendant, in the settlement of the partnership, paid out of his private funds a certain sum of money which he asked to be set off against the note, is fatally defective, where it was not alleged that the partnership was insolvent and its assets exhausted. *pp.* 68, 69.

APPEAL AND ERROR.—Discrepancy Between Amount of Verdict and Proof.—A cause will not be reversed on account of a discrepancy of a few cents between the amount of the verdict and the exact amount found to be due. *p.* 70.

SAME.—Evidence.—A judgment will not be disturbed on appeal on the weight of the evidence, where there is some evidence to support it. *p.* 70.

EVIDENCE.—In Support of Bad Answer.—Error cannot be predicated upon the action of the court in excluding evidence offered in support of a bad paragraph of answer. *p.* 70.

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EVIDENCE.—Partnership.—In the trial of an action on a promissory note brought by the administrator of a deceased partner against a surviving partner, a statement made by experts, containing receipts, drafts, etc., pertaining to the partnership accounts, shown to have been taken from entries on the books made by defendant, after the death of decedent, on the information of the defendant that he had paid them, is not admissible in evidence. *pp. 70, 71.*

INSTRUCTIONS.—Pleading—Partnership.—Where in an action on a promissory note by the administrator of a deceased partner against a surviving partner defendant pleaded as a set-off certain sums of money paid by him individually in settlement of the partnership accounts without raising the question of the solvency of the partnership, no error was committed in instructing the jury that they had nothing to do with the question of the solvency of the partnership, or as to whether the defendant would have to pay the partnership claims from his individual funds on final settlement of the partnership accounts. *pp. 71, 72.*

From the Fayette Circuit Court. *Affirmed.*

G. C. Florea and L. L. Broadbus, for appellant.

D. W. McKee, J. I. Little and H. L. Frost, for appellee.

WILEY, J.—Appellee sued appellant upon a note executed by appellant and payable to appellee's decedent. Appellant answered in five paragraphs. In the third paragraph of answer it is averred that appellant and decedent entered into a partnership in November, 1889, under the firm name of Beckett and Burt, as equal partners to engage in the retail hardware business; that by the terms of said partnership, they were to share equally in the losses and profits of said business; that said partnership was dissolved in June, 1892, by the death of said Burt, and that since said dissolution appellant had been winding up the business of said partnership. It is further charged that when said partnership was formed, appellant did not have sufficient money with which to furnish his half of the capital, and the deceased loaned him such money, for which he executed the note in suit; that in the settlement of said partnership business, in the payments of the debts of the firm, appellant used \$1,437.76 of his private funds, which sum was due and unpaid when said action was

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commenced, and is still due and unpaid, and that said sum should be set off in a sum equal to the amount due on the note. An itemized statement or bill of particulars accompanies this paragraph of answer. The prayer of this paragraph of answer is: "And this defendant now asks, and offers to set off out of said amount due from him from said partnership, an amount equal to whatever amount may be found due said plaintiff on said note in suit."

In his second paragraph of reply to the third paragraph of answer, appellee averred that the note in suit was given for an individual debt owed by appellant to decedent; that at the death of the decedent his estate was and is still insolvent, and was being so settled; that the appellant is the surviving partner of the firm of Beckett and Burt, and that as such surviving partner he was then settling said partnership business in the said Fayette Circuit Court; that the claim is not an off-set against the note in suit, but is a partnership liability and "not a proper set-off against an individual debt." To this paragraph of reply, appellant demurred, which demurrer was overruled and an exception reserved.

We do not notice the other paragraphs of answer and reply, because the record does not present any question for review as to them. Trial was had by a jury, resulting in a verdict for appellee, and over appellant's motion for a new trial, judgment was rendered on the verdict. The action of the court in overruling the demurrer to the second paragraph of reply to the third paragraph of answer, and in overruling the motion for a new trial, is presented for review by the assignment of errors. We will consider these in their order. As to whether or not the court erred in overruling the demurrer to the second paragraph of reply to the third paragraph of answer, it is unnecessary for us to decide. If the third paragraph of answer was not good, the overruling of a demurrer to the second paragraph of reply, even though the reply was bad, would not be available error. This rule has been strictly adhered to in this State, and is well settled and

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entrenched by the authorities. *Peden v. Cavins*, 134 Ind. 494; *Western Union Tel. Co. v. Trumbull*, 1 Ind. App. 121; *Starke v. Dicks*, 2 Ind. App. 125; *Rhinehart v. Niles*, 3 Ind. App. 553; *Jackson v. Estate of Butts*, 5 Ind. App. 384; *Pittsburgh, etc., R. Co. v. Henderson*, 9 Ind. App. 480; *Landon v. White*, 101 Ind. 249.

By a reference to the third paragraph of answer, all of the material averments of which appear above, it seems to us that it is fatally defective. Appellant as is shown by the answer was the surviving partner of appellee's decedent. He was, when the answer was filed, proceeding to settle the partnership under the provisions of the statute. At the same term of court, when the answer was filed, he filed his current report, as surviving partner, and a copy of that report was filed with the answer as an exhibit. The answer avers that appellant, in the settlement of the partnership business, expended over \$1,400 of his individual funds, and that the partnership was indebted to him in that amount. There is no averment in the answer that appellee's decedent was indebted to him in any sum. The partnership business remained unsettled. There is no averment in the answer that the partnership was insolvent. The simple averment that appellant had expended over \$1,400 of his own funds in the settlement of the trust can not supply the omission of the necessary averment that the partnership was insolvent. If the partnership was solvent, it was the duty of appellant to reimburse himself out of its assets, and until such assets were exhausted, he could not enforce any claim against the estate of the decedent to reimburse him for his individual means expended in the settlement of the partnership. The answer does not aver that all the assets of said partnership had been exhausted, nor that all the debts had been paid. For all that appears from the answer, the partnership may have had abundant property or means out of which all of its debts might have been paid. In the affidavit attached to his report, appellant states that he has collected all claims due said firm "and has paid and assumed all

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the debts of said firm," but it nowhere appears, either in the answer or in the exhibit, that all the partnership property had been exhausted, or that the partnership was insolvent.

In *Huff, Adm., v. Lutz*, 87 Ind. 471, it was held that a surviving partner who has not paid all of the partnership debts, but has paid thereon all the partnership assets, and merely assumed and secured the balance, has no right of action against the estate of the deceased partner. In that case the complaint alleged that the partnership was insolvent; that the surviving partner had paid all the partnership assets on the debts and had assumed and secured the balance, yet in an opinion by Bicknell, C. C., it was held that the complaint did not state a cause of action. The allegations of the complaint in that case were stronger by far than those of the third paragraph of answer we are here considering, for there it was alleged that the partnership was insolvent.

Appellant has not brought himself within the rule declared in *Olleman v. Reagan's Adm.*, 28 Ind. 109, in which it was held that where a surviving partner, after exhausting the partnership assets, is compelled to pay the residue of the partnership debts with his own money, he is entitled to recover from the estate of the deceased partner a moiety of the amount thus paid. While there may be other infirmities in the answer, and it is urged by appellee that there are, those pointed out make it fatally defective, and even if the reply was bad, there was no reversible error in overruling a demurrer to it.

In his motion for a new trial, appellant assigned twenty-four reasons, all of which, but the first and second, challenge the action of the court in admitting and rejecting certain specified evidence, and in giving to the jury certain instructions. The first reason assigned for a new trial questions the sufficiency of the evidence to sustain the verdict, and the second is that the verdict is contrary to law. It is most difficult to follow appellant's brief in the discussion of the questions arising under the motion for a new trial, and

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we will examine only those which we think are fairly raised in the argument.

The first and second reasons for a new trial may be disposed of by saying that the evidence fairly sustains the verdict, for upon the face of the note and the credits indorsed thereon, the balance due at the date of the trial was the amount expressed by the verdict. While there is a discrepancy of a few cents in the amount of the verdict and the exact amount shown to be due by a strict mathematical calculation (the discrepancy being about twenty-one cents), yet the variance is so small that it would not warrant a reversal for that reason. See *Grim v. Adkins*, 21 Ind. App. 106, 109. The law does not deal in trifles. There was some evidence, aside from the note and indorsements, to support the verdict. Under the settled rule we can not disturb the judgment where there is some evidence to support it.

Counsel have not given any reason in support of the second cause for a new trial, and we are unable to see wherein the verdict is contrary to law.

In the course of the trial, appellant offered in evidence Exhibit A, filed with his third paragraph of answer, and over appellee's objection the court refused to admit it. It is claimed by appellant that this exhibit was made by two expert accountants from the books of the partnership business. It appears, however, from the evidence of the accountants that many items of the statement were taken from receipts, drafts, notes, etc., which appellant claimed to have paid, both before and after the death of appellee's decedent. It seems clear to us that this statement was not competent evidence, for at least two reasons, to wit: (1) It is clear that this evidence was offered in support of the third paragraph of answer, which, as we have seen, was bad, and hence no error could be predicated upon a refusal to admit evidence in its support. (2) The exhibit as offered was made up, as we have seen, from the books of the partnership and from receipts, drafts, etc. Many of the items appearing in the state-

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ment were shown to be taken from the entries on the books made by appellant, or under his direction after the death of the decedent, and from receipts, drafts, notes, etc., which the accountants embraced in the statement upon the information from appellant that he had paid them. It is plain that the books themselves, kept by appellant after the death of his partner, could not be introduced in evidence against his estate, and it must follow as a logical sequence that statements taken from the books were not admissible. Counsel for appellee urge other objections to the admissibility of the offered evidence, but what we have said sufficiently disposes of the question.

Appellant urges that the court erred in sustaining objections to the introduction of other offered evidence of a like character, but the reasons given in support of the ruling of the trial court upon the evidence we have been discussing fully sustains the action of the court in rejecting it.

In his motion for a new trial, appellant alleged that the court erred in giving certain instructions, but in his brief he has only called our attention to the twelfth, which is as follows: "As to whether upon final settlement of the firm affairs of Beckett & Burt, said firm will be insolvent or not, or as to whether Mr. Beckett will or will not have enough money in his hands to pay himself, as surviving partner, or whether Mr. Beckett will have to pay money out of his individual means to settle the same, you have nothing to do. No evidence has been legitimately introduced before you determining this question." In view of the issues upon which the cause was tried, we are unable to see any objection to this instruction, and counsel have not pointed out any. All they say about it is: "We think the charge erroneous and misleading to the jury."

What we have said in discussing the sufficiency of the third paragraph of answer is applicable in this connection. The question of the solvency or insolvency of the partnership of Beckett & Burt was not raised by the issues. If it was solv-

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ent, appellant must look to its assets to remunerate him for individual funds expended in the settlement of its business. If it was insolvent, it was his duty so to allege. He failed to do this, and when the court told the jury that they had nothing to do with that question, he correctly stated the law under the issues. We do not find any error in the record.

Judgment affirmed.

GOODMAN ET AL. v. SAMPLINER ET AL.

[No. 3,144. Filed October 12, 1899.]

REPLEVIN.—Complaint.—Ownership of Property.—A complaint in an action in replevin which alleges that plaintiff is the owner and entitled to the immediate possession of certain described personal property, unlawfully detained by defendant, contains a sufficient averment as to the title of the property. *pp. 72, 73.*

SAME.—Fraud.—Concealment.—A purchaser of goods on credit, who at the time knows himself to be insolvent, and does not intend to pay for same, and fails to disclose his insolvency, perpetrates a fraud upon the seller which entitles him to disaffirm the sale and replevy the goods, unless the rights of innocent parties have intervened. *pp. 73-77.*

APPEAL AND ERROR.—Assignment of Error.—Instructions.—A joint assignment that the court erred in giving certain instructions is not available if either instruction is correct. *p. 77.*

From the Jay Circuit Court. *Affirmed.*

W. H. Williamson, for appellants.

Emerson E. McGriff, for appellees.

HENLEY, J.—This is an action in replevin begun in the lower court by the appellees as plaintiffs. The complaint is in two paragraphs. Each paragraph of the amended complaint is sufficient to withstand a demurrer. It is alleged that appellees are the owners and entitled to the immediate possession of certain personal property, which is particularly described, and the aggregate value of which is \$1,161.75; that appellants had possession of said property without right, and unlawfully detained the same from appellees.

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It is said by the Supreme Court in *Krug v. McGilliard*, 76 Ind. 28: "The plaintiff may aver his title generally, and prove such facts as show a general or special property, and right of possession. It is sufficient for him to allege generally that he is the owner and entitled to the possession of the goods, and support it by proof of such facts as either show a general or special property in the goods with a right to the possession." In this case, each paragraph of the amended complaint also alleged facts which clearly amounted to fraud upon the part of appellants, and which amounted to a cause of action in appellee's favor. The principal question under the assignment of errors arises from the action of the lower court in overruling appellants' motion for judgment upon the answers to interrogatories notwithstanding the general verdict.

Interrogatory 12 was as follows: "Did the defendant Goodman at the time of the purchase of the goods in controversy, or at the time of their delivery, make any representations to the plaintiffs or their agent as to his solvency, or did he at said time do anything to conceal from these plaintiffs or their agent his true financial standing? Answer. No." It is contended that under the law of the State in cases of this kind, the *concealment* of the true financial condition of the defendant must have been the result of *positive acts* done by him, calculated to prevent the discovery of his real condition. The position taken by appellants' counsel is not tenable. The cases cited in support of their contention are not applicable to the facts alleged and proved in the case at bar. In this case it appears by the evidence, legally admissible under the issues formed, that appellees sold and shipped to appellant Goodman in 1896 a bill of goods amounting to about \$1,200; that in 1895, appellant Goodman had purchased his stock of goods of his brother-in-law, one Davidovitch, and in payment therefor had executed to his said brother-in-law his notes for about \$7,000; that in the spring and summer of 1896, said appellant Goodman purchased of

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different wholesale dealers over \$8,000 worth of goods, all to be delivered in August and September of 1896; that after the goods were delivered and before some of them were unpacked, the said Goodman confessed judgment in the circuit court of Jay county, Indiana, for \$7,710 in favor of said Davidovitch, who caused an execution to issue to the sheriff upon such judgment, whereupon appellees begun this action to recover their goods.

It is shown that appellant Goodman was insolvent, and that he knew of his insolvency at the time the said purchases were made. It was alleged in the complaint that said Goodman purchased said goods without any intention of paying for the same, and for the purpose of cheating and defrauding appellees. The jury had the right to draw the inference that the said Goodman never intended to pay for the goods which he had purchased under the circumstances disclosed by the evidence. We think the law is plain in this State that: "Where a man, knowing himself to be insolvent, conceals his insolvency from the vendor of the goods, and buys the property not intending to pay for it, he perpetrates a fraud which will entitle the seller to reclaim his property. The principle which rules this case is thus stated by the Supreme Court of the United States in *Donaldson v. Farwell*, 93 U. S. 631. 'The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Byrd v. Hall*, 2 Keyes 647; *Kilby v. Wilson*, Ryan & Moody 178; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilsmore*, 1 Barn & Cress. 513; *Stewart v. Emerson*, 52 N. H. 301; Benjamin on Sales, §440, note to American edition, and cases there cited.' In addition to the authorities in the opinion which we have quoted, we refer to *Henshaw*

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v. *Bryant*, 4 Scam. (Ill.), 97; *Patton v. Campbell*, 70 Ill. 72; *Donaldson v. Farwell*, 5 Bissell 451; *Seligman v. Kalkman*, 8 Cal. 207; *Bedault v. Wales*, 19 Mo. 36; *Dowe v. Sanborn*, 3 Allen 181; *O'Donald v. Constant*, 82 Ind. 212." *Brower v. Goodyer*, 88 Ind. 572.

Our Supreme Court have thoroughly disposed of appellant's contention that the concealment of the purchaser's financial condition must be by some positive act of his calculated to deceive the seller. In the case of *Brower v. Goodyer*, *supra*, Elliott, J., adopted 2 Pom. Eq. §906 as the law of this State. The rule so adopted is as follows: "In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or before the purchase, not to pay for the thing bought, constitutes a species of fraudulent concealment." This court has strongly stated the rule in the case of *Tennessee Coal, etc., Co. v. Sargent*, 2 Ind. App. 458, when Reinhard, J., speaking for the court, said: "It is well settled that the vendor of personal property obtained from him by the fraud of the purchaser may bring replevin for the same against such fraudulent purchaser, unless the rights of innocent third parties have intervened; and a purchaser of goods who knows himself to be insolvent, *and fails to disclose such insolvency when buying such goods on a credit*, not intending to pay for them, perpetrates upon the vendor such a fraud as will entitle the latter to disaffirm the contract, and sue for the possession of the goods." To the same effect see *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491.

It will be seen that the courts of appeal in this State recognize the rule that a purchaser of goods on credit, who at the time knows himself to be insolvent, and who at the time of the purchase does not intend to pay for the same, and who fails to disclose his insolvency, perpetrates a fraud upon the seller, which entitles him to disaffirm the sale and replevy the goods, unless the rights of innocent third parties have intervened, and such action upon the part of the purchaser under such circumstances amounts to a fraudulent concealment.

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The case of *Swift v. Rounds* (R. I.), 35 Atl. 45, presents a state of facts almost identical with the case at bar, and in deciding that case, the supreme court of Rhode Island said: "In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them, but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs, the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiff into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with the intent not to perform it. By the act of purchasing the goods on credit the defendant impliedly represented that he intended to pay for them. The plaintiffs relied on this representation, which was material and fraudulent, and was damaged thereby. All the necessary elements of fraud or deceit, therefore, were present in the transaction. * * * It was held that although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet, where it is made with a preconceived design not to pay, it is fraudulent. * * * The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them, and to hold that such a transaction does not amount to fraud would be to make it easy for cheats and swindlers to escape the just consequence of the unrighteous acts. * * The authorities are overwhelming to the effect that it is a fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may

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repudiate the sale and reclaim the property, or may sue in trover or in some other action of tort for the damages sustained by the fraud."

By the general verdict, under the issues, which verdict is sustained by the evidence, it was found that Goodman was insolvent at the time he purchased the goods in question; that he knew he was insolvent at said time; that at the time he purchased said goods he did not intend to pay for them; that he did not disclose his insolvency to the appellees; that he purchased said goods with the intent to defraud appellees out of the value of said goods. These findings would be sufficient to entitle appellees to a judgment. The answer to interrogatory numbered twelve does not therefore affect the general verdict of the jury. The facts presented by the record in this case are such as caused the learned judge in the case of *Dow v. Sanborn*, 3 Allen, at page 182, to say: "In its moral quality it is hard to distinguish it from larceny."

It is also contended by appellant that instruction numbered one, of the instructions given to the jury by the court upon its own motion, ought not to have been given. This discussion arises under the fifth cause assigned in the motion for a new trial, which is as follows: "That the court erred in giving to the jury instructions numbered one, two, three, four, and five on its own motion and over the objections and exceptions of the defendants." As appellant does not argue that instructions two, three, four, and five are erroneous, any objections to such instructions are waived. The assignment being joint, if either instruction is correct, the error is not available. The authorities upon this question of practice are numerous. Upon the facts presented by the record, the judgment of the lower court is correct.

Judgment affirmed.

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DAUGHERTY v. THE MIDLAND STEEL COMPANY.

[No. 2,762. Filed May 19, 1899. Rehearing denied Oct. 12, 1899.]

APPEAL AND ERROR.—Final Judgment.—Dismissal.—Where a verdict was returned, a motion in arrest of judgment sustained on account of the insufficiency of the complaint, and the cause stricken from the docket, the case reached such an end that an appeal will lie. *p. 82.*

MASTER AND SERVANT.—Defective Machinery.—Knowledge of Danger.—Complaint.—In an action by a servant against the master for damages for personal injuries sustained on account of defective machinery, it is not sufficient to allege freedom from fault, but he must show that he had no knowledge of the danger, or, having knowledge, he must show an excuse for continuing in the work at which he was injured. *pp. 82, 83.*

SAME.—Defective Machinery.—Knowledge of Danger.—Promise to Repair.—Time in which to Make Repairs.—Complaint.—In an action by a servant for injuries sustained on account of defective machinery, pending a promise of the master to repair the same, the complaint need not allege that an unreasonable time had not elapsed for the fulfilment of the promise. *pp. 83-85.*

SAME.—Defective Machinery.—Knowledge of Danger.—Promise to Repair.—The question whether a servant continued to work for an unreasonable time with defective machinery after a promise by the master to make repairs must vary according to the circumstances of the case, and is a question of fact for the jury. *pp. 84, 85.*

SAME.—Defective Machinery.—Knowledge of Danger.—Promise to Repair.—Complaint.—Where a complaint in an action by a servant for injuries sustained on account of defective machinery alleged that the servant complained of the defects and the master promised to remedy them, and that the servant, relying upon such promise, continued in the service and was injured within six days after the promise was made, an allegation that a sufficient time had elapsed for the fulfilment of the promise when the injury occurred does not vitiate the complaint. *pp. 84-86.*

From the Delaware Circuit Court. *Reversed.*

J. N. Templer, C. C. Ball and E. R. Templer, for appellant.

W. H. H. Miller, J. B. Elam, S. D. Miller and J. W. Fesler, for appellee.

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BLACK, C. J.—The appellant brought his action against the appellee to recover damages for a personal injury. The complaint showed that the appellant was engaged as an employe of the appellee in its manufacturing establishment, at work in a pit wherein was a certain hydraulic crane, connected with which was a hydraulic feed pump, by the use of which the water to operate the crane was pumped from a cistern into an accumulator, whence the water flowed into the crane and operated it. From the jib of the crane were hung certain heavy iron chains, and the crane was used in appellee's business for lifting, moving, and handling heavy billets of steel and iron and other weighty articles. It was operated by hydraulic pressure, and when in proper order and condition, easily, safely, readily, rapidly, and promptly could be started, moved, stopped, and otherwise controlled by the person operating it, whether loaded or empty. The pit in the factory in which the crane was operated was large and roomy, and furnished reasonable opportunity for the workmen there employed to perform their duties with reasonable safety. It was alleged that the appellee hired the appellant to work at said business in said pit, where said crane was operated, and he worked therein pursuant to said hiring; that while he was so working therein, on or about the last of September, 1895, and about ten days next before he suffered the injury complained of, the appellee negligently permitted said crane, and the appliances whereby it was so operated, to become and remain defective and out of repair, in that the water-valves, commonly called check-valves, of said hydraulic feed pump and the accumulator of said crane became and were worn, untrue and out of repair, and would not fit tightly in and upon their respective valve-seats in said pump, so that by reason of said defect in said check-valves, and their failure to fit tightly in and upon their valve-seats, said pump leaked badly and would not hold water, and, by reason of said leaking and inability to hold water, said pump could not keep said crane suffi-

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ciently supplied with water properly to perform its functions, and the leaking of said accumulator contributed to reduce the power of said crane, so that thereby it became difficult for the person operating the crane to control it, and it was difficult to start it, and impossible properly to control it, or promptly to stop it when in rapid motion, whereby the operation of the crane became dangerous to the workmen in the pit, by reason of their liability to be struck and injured by the crane and its heavy chains and the billets or heavy substances appended thereto while in motion with said crane, and whereby the hazards of the appellant's employment were enhanced. It was further alleged, that at the same time the appellee negligently permitted the available dimensions of said pit to become and to remain materially lessened, by reason of accumulations therein and around the sides thereof of large quantities of scrap, dirt, sand, clay, bricks, steel billets, and molds, whereby said workmen laboring in said pit were hampered and rendered in danger from being hit by said chains and loads attached thereto while in motion with said crane, and whereby said dangers of said workmen were greatly increased and the hazards of appellant's said employment were further enhanced. It was alleged that the appellant, "on or about the last of September, 1895, and within about ten days prior to the date of plaintiff's said injury hereinafter stated, having knowledge of the dangers and hazards of his said employment, complained about the same to" certain persons named, being defendant's superintendent of steel furnaces in said factory, its foreman of the open hearth steel furnaces in said factory, its night foreman of said open hearth steel furnaces in said factory, and the defendant's pit boss of said pit where plaintiff worked; "and particularly the plaintiff complained to said parties of said defective crane and appliances; and defendant by her said officers, superintendent, foremen, and boss aforesaid, then and there induced plaintiff to continue to work in said dangers by promising that within a reasonable time said

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crane and appliances would be repaired and its appliances be put in proper working order, and by promising to remove said scrap, dirt, sand, clay, bricks, steel billets, and molds from said pit; that soon after the making of said promises, and while said promises remained in force, and when sufficient time for the fulfilment of said promises had elapsed, to wit, within six days after said promise was made, and when the same was wholly unfulfilled, and when the plaintiff believed and had good reason to believe the defendant still intended to fulfil said promises, and while plaintiff was so working in said pit in defendant's said business in pursuance of said hiring, and while said service was not so imminently dangerous that a man of ordinary prudence would have refused to work therein, said crane, in spite of the efforts of the persons operating the same to stop the same, and while being so operated in defendant's said business, moved swiftly and caused heavy chains so hanging from said jib thereof to strike plaintiff and knock the plaintiff against a steel post, whereby," etc., the plaintiff's injury being particularly described. It was alleged that if said crane and said appliances had been kept constantly in good repair, said crane could have been promptly stopped without striking or injuring the appellant; that said hampered condition of said pit, resulting from said accumulations therein of scrap, dirt, sand, clay, brick, steel billets, and molds, hindered the appellant from eluding and escaping said injury from said chains; that the appellee's "permitting said crane and said appliances so to become defective and out of repair, and said permitting said scrap," etc. to accumulate in said pit was the sole and immediate cause of said injury to appellant; that the appellant was without fault or negligence contributing to his said injury; "that by reason of the premises, the plaintiff has been damaged," etc.

The appellee answered by a general denial and a paragraph of affirmative defense, which need not be further

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noticed. There was a trial by jury, and a general verdict in favor of the appellant for \$2,500 was returned, with answers of the jury to interrogatories submitted by the parties. The appellee moved in arrest of judgment, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained this motion and ordered that the judgment rest, to which ruling and order the appellant excepted; and thereupon the appellant asked leave to amend the complaint, and time was given; but at the next term of the court, the appellant withdrew his request to amend, and, upon the order of the court, the cause was struck from the docket.

There has been some discussion by counsel of a suggestion that there has been no final judgment, and that therefore the appeal is not well taken. We cannot accede to this suggestion. The controversy was ended between the parties so far as the court below could do anything in this case to terminate it. The case had reached such an end in the court below that under the precedents and authorities in this State an appeal would lie. *Powell v. Kinney*, 6 Blackf. 359; *Raber v. Jones*, 40 Ind. 436, 441; *Crawford v. Crockett*, 55 Ind. 220, 225; *Newman v. Perrill*, 73 Ind. 153; *Stewart v. Terre Haute, etc., R. Co.*, 103 Ind. 44.

We are to determine whether or not the complaint was so defective that it could not be regarded as sufficient after verdict. The part of the complaint to which the argument before us relates is the above quoted portion relating to the promise to repair and the continued service thereafter of the appellant. In *McFarlan Carriage Co. v. Potter*, 21 Ind. App. 692, we had occasion to consider the principles governing the class of cases to which the one at bar belongs. That case was afterward decided by the Supreme Court, on the 20th day of April, 1899. *McFarlan Carriage Co. v. Potter*, 153 Ind. 107. The learned counsel for the appellee in the case at bar represented the appellant in that case, presenting similar theories in both cases. We may somewhat shorten this

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opinion by referring to the opinions delivered in the case just mentioned by the Supreme Court and this Court.

It is a familiar rule of pleading in such cases, in this State, that it is not sufficient for the complaining servant to allege his freedom from fault and negligence, but he must also show that he had no knowledge of the danger, since if he did have such knowledge and voluntarily continued in the service, he is deemed to have assumed the risk as an incident thereof. *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Peerless Stone Co. v. Wray*, 143 Ind. 574. In a complaint not showing the complaining servant's ignorance of the danger, but showing that he had knowledge thereof, and while continuing in the service with such knowledge was injured, there should be some averment showing an excuse for so continuing in the work at which he was injured; otherwise the plaintiff will be regarded as having assumed the risk. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1. If it is intended to rely upon the master's promise to repair, it should be pleaded. *Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Malm v. Thelin*, 47 Neb. 686, 66 N. W. 650; *Becker v. Baumgartner*, 5 Ind. App. 576.

The complaint before us shows that the servant complained of the defects, and that the master promised to remedy them. The promise relating to the defective appliances is alleged to have been a promise to repair within a reasonable time. The promise to remove the impeding material is stated as a general promise, no time of performance being designated in the making of the promise, so far as appears from the pleading. It is shown that the servant, while continuing in the service, was injured within six days after the promises, the service not being so imminently dangerous that a man of ordinary prudence would have refused to do so. It is alleged that he was induced so to continue to work by the promises, and that the injury occurred while he was so working, while the promises remained in force but had not been fulfilled, and that the servant at the time of the injury believed and had good

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reason to believe that the master still intended to fulfil the promises. The pleading also denies contributory negligence. It is also alleged that sufficient time for the fulfilment of the promises had elapsed when, within six days after they were made, he was injured. We think that, under the authorities, the complaint must be regarded as sufficient, unless it can be said to be materially vitiated by this last mentioned averment, which it appears from a brief for the appellant was thought by the pleader to be necessary because of remarks in *Burns v. Windfall Mfg. Co.*, 146 Ind. 261.

In *McFarlan Carriage Co. v. Potter*, *supra*, we referred to the adoption in *Hough v. Railway Co.*, 100 U. S. 213, by the Supreme Court of the United States, per Mr. Justice Harlan, of the statement in *Shearman and Redfield on Negligence*, that there can be no doubt that when a master has expressly promised to repair a defect, the servant can recover for "an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance," or "within any period which would not preclude all reasonable expectation that the promise might be kept." We declined to accede to the view that the complaint in such a case must show that the master had had a reasonable time after the promise and before the injury in which to make the repairs. The question whether the master had had a sufficient time to repair is not equivalent to the question whether the servant at the time of his injury had continued in the employment beyond the period which it was reasonable for him to allow the master to perform his promise and until such a period had elapsed that all reasonable expectation that the promise might be fulfilled was precluded.

Whether the servant has continued to work for an unreasonable time after the promise must vary according to the circumstances. The repairs may in one case require the manufacture of parts of a machine at a distant place, while in another case the necessary materials and needed workmen for the making of the repairs may be procurable immediately.

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Many evidentiary facts may be involved in the question. Whether an unreasonable period has been allowed must be a question of fact for the jury under proper instructions. The failure of the master for an unreasonable time to perform his promise does not go to his credit. He is "not in the exercise of ordinary care unless and until he makes the assurances good." Cooley Torts, 559. The allowance of an unreasonable time by the servant to the master in which to fulfil his promise precludes his recovery, according to the authorities, on the ground of assumption of the risk by the servant.

It was not necessary for the pleader to state that the servant had not allowed the master an unreasonable time. Having shown that he was serving under a promise of the master to repair, it would be matter of defense if he allowed too long a period. And we can not say as matter of law that six days was certainly too long a period of waiting.

In *McDonald v. Chesapeake, etc., R. Co.*, (Ky.) 5 S. W. 413, the complaint alleged that the defect of a want of a railing around a platform was known to the plaintiff before and at the time of his injury, and that he continued in the service to the date of his fall, on the assurance of the defendant that the defect or danger in the platform, or attending the work, would be made more secure within a reasonable time, and that the plaintiff had been working in the shop some three or four days before he fell from the platform. A demurrer to the complaint was sustained by the trial court, and this ruling was approved by the court of appeals of Kentucky, on the ground that the plaintiff did not aver that the defendant failed to make good its undertaking within a reasonable time; that it was not averred that a reasonable time had elapsed during which the platform might or could be made secure, but the court was left to infer that three days was a reasonable time in which to have the railing constructed. On petition for a rehearing in that case, the court reconsidered its former opinion, and held that the petition stated a cause of

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action. It was then said: "The promise by the employer to repair within a reasonable time after notice by the servant of the danger places the risk on the employer. There is no pretense that the appellant used the platform for such a length of time as would evidence the belief that the employer intended to or had violated his promise to repair."

In *Ferriss v. Berlin Machine Works*, 90 Wis. 541, 548, 63 N. W. 234, the court instructed the jury that if the plaintiff, with knowledge of the defect, continued in the employment upon the faith of repeated promises of the defendant to repair the defect, for a longer time than was reasonable to allow the defendant to perform his promise or promises, then the employe must be deemed to have waived the objection and assumed the risk; and that whether, under the circumstances, he continued in the employment only a reasonable time was mainly a question of fact to be determined by the jury from all the facts and circumstances disclosed by the evidence. In this charge the court on appeal found no error; and the jury having found that the plaintiff did not continue longer than a reasonable time after he knew of the defect, the court said it could not say that this finding was not sustained by the evidence. See, also, *Lyberg v. Northern Pacific R. Co.*, 39 Minn. 15, 38 N. W. 632.

When the allegation in the complaint before us, that a sufficient time for the fulfilment of the promises had elapsed, is considered in connection with the averment that the promises remained in force, and that the plaintiff believed, and had good reason to believe, the defendant still intended to fulfil the promises, whatever may be conjectured as to the purpose of the pleader, it cannot be supposed that it was intended to allege the equivalent of an averment that at the time of the injury all the time had elapsed that it was reasonable for the plaintiff to allow for the performance of the promises, or that such a period had elapsed as precluded all reasonable expectation that the promises might be kept.

We think the motion in arrest should have been overruled. Judgment reversed.

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INDIANAPOLIS GAS COMPANY v. SHUMACK.

[No. 2,802. Filed June 28, 1899. Rehearing denied Oct. 12, 1899.]

MASTER AND SERVANT.—Personal Injuries.—Employer's Liability Act.

—*Corporations.*—Plaintiff, while in the employ of defendant gas company, under the direction of the superintendent, went into a trench to repair a leak in the gas-main. The superintendent approached with a lighted lantern and the escaping gas ignited, causing an explosion, injuring plaintiff. *Held*, that the action of the superintendent in approaching the trench with a lighted lantern was the proximate cause of the injury, and that defendant was liable therefor under the provisions of the employer's liability act, §7088 Burns 1894. *pp.* 88-90.

SAME.—Personal Injuries.—Employer's Liability Act.—Corporations.

—In order that there may be a recovery under subdivision two, section one of the employer's liability act, §7088 Burns 1894, it must appear that the person whose negligence caused the injury was in the service of the corporation; that the employe injured was, at the time of the injury, bound to conform to the orders of such person; and that the injured employe, himself without fault, was, when injured, complying with such orders. *p.* 90.

SAME.—Employer's Liability Act.—Corporations.—The second subdivision of the employer's liability act (§7088 Burns 1894), making a corporation liable for injuries to an employe resulting from the negligence of any person in the service of such corporation to whose orders or directions the injured employe at the time of the injury was bound to conform, and did conform, is not nullified by the provision of subdivision four of the same section, limiting the liability of such corporation to instances where the person causing the injury was performing the duty of the corporation in that behalf, since each subdivision specifies different employes. *pp.* 90-93.

INSTRUCTIONS.—Must Be Considered as a Whole.—An instruction will not be considered in detached portions. *pp.* 93, 94.

VERDICT.—Interrogatories.—Conflict.—No presumptions are indulged in favor of special answers to interrogatories, and if such answers control and overthrow the general verdict, they must not only be in conflict with the general verdict, but they must be consistent with each other and free from any obscurity. *p.* 94.

From the Hamilton Circuit Court. *Affirmed.*

T. J. Kane, R. K. Kane and T. E. Kane, for appellant.

W. R. Fertig and H. J. Alexander, for appellee.

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ROBINSON, J.—Appellee recovered a judgment for personal injuries inflicted by an explosion of natural gas, caused by the alleged negligence of appellant while appellee was employed in repairing a gas-main.

The complaint avers that appellee was for some time prior to the accident in appellant's employ at a certain station, and his duties were to regulate the supply of gas as directed from the Indianapolis office, and keep the pressure sheet and register of wells, and report the same to appellant at Indianapolis; that the general superintendent or general foreman for appellant was one Stoner whose orders appellee was bound to obey; that it was determined to repair a dangerous leak in the main near the station where appellee was employed, and that appellee by Stoner's directions procured a number of men to assist in the work, which was to be done at night; that all the men, including appellee, were acting under the orders of Stoner, and all tools, machinery, and appliances were supplied by appellant; that the night was very dark and Stoner had procured ordinary lanterns and negligently allowed the same to be used, when ordinary care required him to procure and use only safety lanterns; that a trench had been prepared which was seven feet deep at the place where appellee was injured, that the gas had been permitted to escape from the line by opening the escape valves; that appellee, pursuant to the order of Stoner, entered the trench and in the dark was feeling with his hands to ascertain if the pipe was parting as desired, and while so engaged and being unable to see the approach of any one on the bank on account of the depth of the trench, Stoner carelessly and negligently approached the same and came to the bank of the trench, carelessly and negligently bearing in his hands an open lighted tubular lantern, while gas in great quantities and volume was escaping at that point, all of which Stoner knew, igniting the gas and causing an explosion which produced the injuries described; that appellee did not know of Stoner's approach and had warned him not to do so.

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The jury found in answer to special interrogatories that appellee had been engaged in the business of handling natural gas and the implements and machinery connected with the business, about ten years; and had been in the employ of appellant several years; that he was a skilled man in the business; knew the properties of natural gas and that it would explode if exposed to fire; that he knew the kind of lantern which had been supplied for use in doing the work; that he frequently did work on the lines and wells; that he did not object to doing the work at night; that he engaged the services of part of the laborers to do this work; was directing the workmen in doing the work; that Stoner cautioned appellee and the workmen to be careful and avoid accident; that in the evening before the work was done appellee did not say that it would not be unsafe; that the night was dark and two lanterns were in use; that appellee did not, immediately preceding the explosion jump into the trench, but he was in the trench; that he knew gas was escaping when he went into the trench; that prior to the accident and before beginning the work appellee knew the kind of lanterns that had been provided to give light, by which to do the work; the gas escaped from the end of the pipe where the broken bell was located, which was about fifteen feet from where Stoner was standing at the time of the accident; that appellee, at the time of the accident, was working about twenty-five feet from the end of the pipe where the bell was located; that Stoner was standing about three or four feet from where appellee was working; appellee knew Stoner was standing out in the middle of the road prior to the accident and when appellee was in the trench.

The theory of appellee's complaint, and this theory is adopted by counsel on both sides, is that the cause of the injury was the act of the superintendent, Stoner, in approaching upon the bank of the trench with a lighted lantern and igniting the gas. It is first insisted that the verdict of the jury is contrary to law and is not sustained by sufficient

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evidence. No good purpose would be subserved by setting out the evidence. Suffice it to say there is evidence to support the material averments of the complaint, and such being true we can not review the action of the jury. We think it clearly appears from the evidence that the proximate cause of the injury was the act of Stoner in approaching the trench with the lighted lantern.

This case is governed by the second subdivision of §1, Acts 1893, p. 294, §7083 Burns 1894, §5206s Horner 1897, known as the employer's liability act, as follows: "1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: * * *

"2. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employe at the time of the injury was bound to conform and did conform."

In order that there may be a recovery under this provision it must appear that the person whose negligence caused the injury was in the service of the corporation; that the employe injured was, at the time of the injury, bound to conform to the orders of such person; and that the injured employe, himself without fault, was, when injured, complying with such orders.

Counsel for appellant argue that this case is governed by the doctrine laid down in *Pierce v. Oliver*, 18 Ind. App. 87, upon the question of the liability of a corporation for injuries to an employe caused by the negligence of a fellow servant. But the facts in that case were materially different from the facts in the case at bar; besides in that case the statute in question was not under consideration, and a liability was claimed and exclusively relied upon without reference to the statute. It was there held that the injured employe and the employe whose negligence caused the injury were fellow

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servants. That case was tried without reference to the statute, and upon appeal any right to recover under the statute was disclaimed. Under the statute in question the legislature has fixed a liability provided certain conditions exist, and the liability is placed upon a principle different from the fellow servant rule. In *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, the court said: "The statute places the case upon a principle different from that in support of the co-servant's rule and the assumption of risk. The test here is threefold: (1) Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was bound to obey? (2) Did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was at the time bound to obey? (3) Was the injured party, at the time of the injury in the exercise of due care and diligence? If these three things concur, appellee exhibits a good cause of action."

In the case of *Hodges v. Standard Wheel Co.*, 152 Ind. 680, cited by counsel, Hodges was injured by the negligence of one Huey, whom the regular foreman had temporarily left in charge of the work, and who at the time of the injury was assisting appellant in the work. In that case the court said: "The statute in question certainly intends that where the injury results from the negligence of a person in the service of a corporation that such person must be one who is by it at least expressly or impliedly authorized to give the order or direction and thereby require the employe to obey. If he is not, then, in a legal sense, the employe is not bound to conform to his order. Huey, as we have seen, is shown by the facts not to have been invested with this power or authority by appellee, and consequently was not the person whom the statute contemplated as the one to whose orders appellant was bound to conform."

It is insisted that there is no evidence tending to show that appellee got into the trench when injured in obedience to

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any order of the superintendent, Stoner; and that conceding that appellee went into the trench pursuant to Stoner's order, the evidence shows that the injury occurred long after the order had been given and obeyed and as a result of the negligent handling of the lantern by Stoner while acting as a fellow servant.

There is evidence that Stoner was appellant's superintendent and that the work was being done under his direction, and that appellee was at the time subject to his orders; that Stoner had the excavations made, was present all the time up to the time of the accident, and that the work was done as he directed. Appellee had testified that he had been at work in the trench and had come out and walked out to where some men were preparing a pipe to be used; that appellee and Stoner "walked out in the yard; the gas was making some noise, a kind of dull roar; we walked out into the yard, and he says, 'What do you think about that?' I says, 'I don't know so much about it;' he says, 'Do you think we can make it?' I says, 'I don't know, Syl, it is just as you say.' He says, 'Go on ahead, if we get stuck we will quit until to-morrow morning.' I went on ahead over where the boys were working the windlass, went into the ditch and was down at this 12-inch gate, seeing whether it was starting, what it was doing; I told them to raise the pipe up, they did so, told them to let it down, they did that; we shook it around there a little; in the meantime Mr. Stoner had come up close to this hole with the lantern; I did not see him until I raised up to get some air; I warned him, I says, 'Don't come too close with that thing, the wind is blowing your way, it is dangerous.' I again stooped down, when I raised up he says 'How are you making it, Wallace?' I says, 'I think she is doing all right;' we shook the pipe around a little; then in a few minutes I says, 'All right, boys, change your windlass;' I started out of there; Mr. Stoner stepped up too close and ignited the gas."

We think there is evidence to show that appellee when in-

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jured was working in obedience to orders of Stoner. We do not understand it to be necessary that the injury should have happened immediately following some order. It is not to be presumed that it was intended that there should be orders from the superintendent concerning all the minor details of the work. There is evidence that appellee went back into the trench and continued the work under Stoner's orders, and that soon thereafter, and while engaged in that work, was injured.

It is further argued that this case is governed by the fourth subdivision of §7083, *supra*, and that there is no liability because the injury was caused by the act of a fellow servant who was not at the time performing any duty of the corporation. But the section is to be construed as a whole. As was said in *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420: "The second subdivision of §1, *supra*, is not nullified by the specification and enumeration contained in subdivision four of said section, as is urged by appellant. Both subdivisions are equally parts of the same section, and relate to the same subject-matter. Each subdivision specifies different employes, but in common they distinguish employes of a superior rank,—employes clothed with responsibility and authority of the employer,—and both must be governed by the same rules of interpretation. The section must be construed as a whole. Black Int. Laws, p. 146."

Upon a careful consideration of the evidence we can but conclude that the jury was authorized in finding that appellee was working where he was in obedience to the orders of Stoner whom he was at the time bound to obey; and that the injury resulted to appellee from the act of Stoner in approaching the trench with the lighted lantern, and that this act of Stoner was the proximate cause of the injury. See *Louisville, etc., R. Co. v. Wagner, supra*.

Complaint is made of the twelfth instruction. Taking that instruction as a whole we think it correctly states the law. That portion of the instruction to which appellant

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directs its argument, if standing alone, might be open to objection, but the rule is well settled that an instruction is not to be considered in detached portions. The effect of the instruction upon the particular point is that if appellee was injured while working for appellant under the supervision and direction of the superintendent and was injured through the carelessness and negligence of the superintendent, the negligence of such superintendent would be imputed to appellant.

It is insisted that judgment should have been rendered in appellant's favor on the answers to interrogatories notwithstanding the general verdict. It is a well settled rule that no presumptions are indulged in favor of special answers, and that if the answers are to control the case and overthrow the general verdict, they must be not only in conflict with the verdict, but they must be consistent with each other and free from any obscurity. The appellee has the general verdict in his favor, which says that all the material facts in the case have been proved; and, if upon any supposed hypothesis this verdict and the answers can be reconciled, it must stand. *Citizens St. R. Co. v. Hoop*, 22 Ind. App. 78, and cases cited.

It can not be said that the answers show that appellee knew Stoner was holding a lantern near where appellee was working. The jury say that appellee knew that Stoner was standing out in the middle of the road, but there is no finding that appellee knew he had come up to the trench and was standing there with the lantern. The answers upon this point are somewhat obscure, but we can indulge no presumption as to what the jury meant. Taking the answers together and construing them as a whole we fail to see anything in them in irreconcilable conflict with the general verdict.

There is no error in the record for which the judgment should be reversed. Judgment affirmed.

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McDOEL, RECEIVER, ETC., v. GILL.

[No. 2,810. Filed May 16, 1899. Rehearing denied Oct. 12, 1899.]

NEGLIGENCE.—Railroads.—Fires from Engines.—The negligent use of proper machinery may be made the basis of an action against a railroad company for damages for burning property adjacent to the railroad. p. 96.

VERDICT.—Answers to Interrogatories.—Conflict.—Railroads.—Fires.—Answers to interrogatories, in an action against a railroad company for damages for burning property, showing that the engine was provided with a good spark-arrester, but that the engine was improperly operated by running at too great a speed in so short a distance after starting, are not in conflict with a general verdict for plaintiff. pp. 96-98.

EVIDENCE.—Railroads.—Fires.—Evidence that sparks of fire and live cinders were thrown upon the roof of a building by a passing engine a short time before the fire was discovered, that there were no indications of fire before the engine passed, and that within a few minutes after the engine passed fire was discovered in that part of the building where the sparks were seen to fall, furnishes a sufficient basis from which the jury could infer that the fire originated from such sparks and cinders. pp. 98, 99.

From the Parke Circuit Court. *Affirmed.*

E. C. Field, W. S. Kinnan, and Puett & McFaddin, for appellant.

D. C. Storer and George Harney, for appellee.

ROBINSON, J.—Appellee recovered a judgment for the loss of property by fire averred to have been caused by appellant's negligence. The errors discussed are overruling appellant's motion for judgment on special answers, notwithstanding the general verdict, and the motion for a new trial.

The special answers to interrogatories show that the fire was set by appellant's locomotive engine; that the engine was provided with a spark-arrester known as an extension front, and was in good repair and was the best known, or equal to the best, for the prevention of escape of fire; that in passing appellee's property, the engine was not properly operated by

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a skilled engineer; that it was improperly operated by running at too great a speed in so short a distance after starting; was hauling a through passenger and mail train and was running twenty-five miles an hour; that the fire started on the roof of the building; that there were a number of other frame buildings along the railroad track and within two squares north and south of the property that burned.

The first paragraph of complaint avers that in running the locomotive past the building, appellant carelessly and negligently allowed sparks and coals of fire to escape and be emitted from the engine, thereby setting fire to the building. In the second paragraph it is averred that appellant's servants so carelessly, recklessly and negligently operated the engine by running at an unusual reckless rate of speed and that by the unusual, careless, and negligent operating the engine so as to cause it to throw out sparks and coals of fire which fell upon the roof of the building, it was set on fire. An engineer might be skilful and his engine in good repair, and still he might so negligently operate the engine as to produce actionable injury. A court can not say that running a train twenty-five miles an hour constitutes actionable negligence. But the answer to the interrogatory as to the manner in which the engine was operated does not mean simply that it was running at that speed; but it means the bringing of the train to that speed in so short a distance. The answer shows that the engine had been stopped and the improper operation of the engine consisted in too suddenly reaching a high rate of speed. It is the law that negligence in the use of proper machinery may be the basis of an action for damages for burning property adjacent to a railroad. *New York, etc., R. Co. v. Baltz*, 141 Ind. 661.

It is true that if, in the necessary use of fire for the production of steam by the usual and best appliances, without negligence, sparks escape and set fire to adjacent property, the loss must be borne by the owner as one of the incidents of the operation of railroads. The use of fire to create mo-

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tive power of an engine is both necessary and lawful, and sparks may escape notwithstanding the best appliances known may be used to prevent their escape. So that in order to show a liability for the escape of sparks, this conceded right must be shown to have been exercised in an improper manner. And in determining whether the engine was operated in a proper manner at the particular time and place, all the surrounding circumstances that would tend to throw light upon the question, such as the proximity of buildings, the kind of weather, direction of the wind, and the like, should be considered. A higher degree of care would be required in running an engine through a town where wooden buildings are so near the track as to be exposed to fire from sparks than would be required in running in the open country. The general verdict finds that the engine was negligently operated, and the special answers find that it was not properly operated and specifies in what that consisted. There is nothing in the special answers in irreconcilable conflict with the general verdict.

In *Caswell v. Chicago, etc, R. Co.*, 42 Wis. 193, the jury found generally, and also specially found that the company was guilty of negligence "by not using proper precaution, in handling the engine, to prevent the extraordinary escape of sparks in passing the barn." Objection was made to this finding that it was defective as stating a mere conclusion of law. "But" the court said, "it is manifest that it might be difficult, if not impossible, for a party to show, and the jury to find, the precise act or thing which constituted negligence. For instance, the evidence might be perfectly conclusive to show that employes of the company had managed the engine in an unskilful and improper manner, and that a fire had been caused thereby, but a party might not be able to prove the specific negligent act, whether it was in running the train too fast, putting on too much steam, opening drafts or supplying fuel, or in what it was. * * * The jury found

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that the employes did not take or use proper precaution, in managing the engine, to prevent the escape of fire. This was a sufficiently specific finding in respect to negligence." See *Fero v. Buffalo, etc., R. Co.*, 22 N. Y. 209.

The evidence shows that the train had stopped at a crossing; that the property burned was adjoining appellant's road and was about two blocks farther on from this crossing and that each block is 350 feet long. There is evidence that the train started as rapidly as it could and when along about the building had reached a speed of twenty-five miles an hour; that the engine as it passed this building emitted a good many sparks, was "showering sparks," that the sparks "were all pretty big," that it was throwing live cinders; that the engine was running upon a curve; that the wind was blowing from the track towards the building and the sparks were seen lighting on the roof by witnesses; and within twenty-five or thirty minutes the building was discovered to be on fire; that "they pulled the engine open" at a point just before it passed this building. One of the witnesses who saw the sparks was night watchman at a mill in the vicinity whose duty it was to watch for fires. There is evidence that when the fire was discovered, it was in the roof on the side next the track. Witnesses who saw the building within less than an hour before the fire testified they saw no indications of fire about the building.

The evidence was very conflicting upon some material matters, but this conflict has been considered by the jury and by the trial court upon the motion for a new trial, and with their determination of the matter we can not interfere, no matter what we might think about the preponderance of the evidence. There is evidence to support the verdict.

It is not necessary to prove the origin of such fires by direct or positive evidence; but it may be, and often is, proved by circumstances. If witnesses saw sparks of fire and live cinders thrown upon the roof of the building by the engine a short time before the fire was discovered, and

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about the time the train passed, and before it passed persons saw the building, and were near it, and saw no indications of fire, and within twenty or thirty minutes after the engine passed fire was discovered in that part of the building where the sparks were seen to fall, the jury could infer that the fire originated from such sparks and live cinders. See *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69.

In the case of *New York, etc., R. Co. v. Baltz*, 141 Ind. 661, cited by counsel, the jury found, by the answer to an interrogatory, that the engine while passing the property burned was properly operated by a skilled engineer. In the case at bar, the jury found directly the contrary. In the *Baltz* case, there was a perfect engine, properly operated by a skilled engineer, and it was held that if sparks from such an engine caused a loss, the company was not liable in the absence of negligence on its part; but that case recognizes the doctrine that negligence in the use of properly equipped engines may create a liability for the burning of property from sparks. And the case of *Ruffner v. Cincinnati, etc., R. Co.*, 34 Ohio St. 96, cited by counsel, recognizes the rule that a liability for the exercise of a right arises when it is shown that the right was exercised negligently, unskillfully or maliciously.

We find no error. Judgment affirmed.

TOSETTI BREWING COMPANY v. GOEBEL ET AL.

[No. 2,859. Filed October 18, 1899.]

MORTGAGES.—Foreclosure.—Rents During Year of Redemption.—

Appellant brought suit to foreclose a mortgage, and appellee and others filed cross-complaints for the foreclosure of junior mortgages and mechanics' liens. The judgment of appellant was made a first lien, and that of appellee the second. The property was sold under appellant's judgment and bid in by appellant for the full amount of its judgment and costs, and at the expiration of the year for redemption appellant received a deed for the property. The court, upon the application of appellee, directed the receiver to pay the

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rents collected during the year of redemption to appellee, from which appellant appealed. *Held*, that neither appellant nor appellee was entitled to the rents.

From the Lake Circuit Court. *Affirmed*.

A. F. Knotts, for appellant.

F. N. Gavit and *John A. Gavit*, for appellees.

COMSTOCK, C. J.—Appellant commenced this action against the appellees to foreclose a first mortgage on two lots on which were located an opera house and business rooms in the town of Whitely. Cross-complaints were filed for the foreclosure of junior mortgages and mechanics' liens. During the pendency of the action, upon application of one of the appellees, a lien holder upon two liens, a receiver was appointed, who took possession, by virtue of his appointment, of the buildings, managed the premises and collected the rents. Such proceedings were afterwards had as resulted in the rendition of judgments and decrees in favor of the respective parties entitled thereto. The judgment of appellant was made a first lien; that of appellee Weisiger, the second. The property was sold under appellant's decree, and was bid in by it for the full amount of its judgment and costs and accruing costs, receipted its judgment in full, paid the costs and took a certificate of sale. The receiver continued in possession during the year for redemption. At the expiration of the year for redemption, appellant received from the sheriff a deed for the property. Appellee Weisiger then petitioned the court to direct the receiver to pay to her the rent money collected during the year in his hands, amounting, after the payment of the insurance, to \$400, as shown by his final report. The lower court directed the money to be paid to appellee Weisiger and the receiver discharged. The notes and mortgages were executed and all the proceedings had since the redemption law of 1881 took effect. Appellee Weisiger contends that as she had a second lien, and as appellant bid in the property for the full amount

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due it, that she was entitled to the rent. Appellant insists that as the money in controversy was collected during the year of redemption, and as neither of the appellees had availed him or herself of the right to redeem within the year, the money belonged to it: First, because the sheriff's deed took effect at and from the date of the sheriff's sale, subject only to the right of redemption; second, appellee could only have redeemed by paying all the amount of appellant's bid, together with interest at the rate of eight per cent., as provided by statute; and that having failed to do this, the rents belonged to appellant in lieu of interest. This is the only question in the appeal.

The rights of the owner of the mortgaged property are not involved in this appeal. The controversy is solely between appellant and appellee Weisiger. Under the recent decision of our Supreme Court in *World Building, etc., Co., v. Marlin*, 151 Ind. 630, neither appellant nor appellee was entitled to the rents claimed. The record therefore presents no error of which the appellant has the right to complain. Further discussion is rendered unnecessary, and the judgment is affirmed upon the authority of the case above cited.

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[No. 2,860. Filed October 13, 1899.]

DECEDENTS' ESTATES.—Desperate Claims.—Suit by Creditor.—Where an administrator files in court claims due the estate for the benefit of the creditors, heirs, and legatees of decedent, suit may be brought thereon, in the manner provided by statute, while the estate is pending, or after final settlement and discharge of the administrator. *pp. 102, 103.*

SAME.—Desperate Claims.—Suit by Creditor.—Where an estate has been finally settled, a creditor whose claim remains in whole or in part unpaid may bring suit in his own name upon claims filed by the administrator for the benefit of the creditors of decedent. *p. 103.*

SAME.—Desperate Claims.—Suit by Creditor.—Complaint.—A complaint by a creditor of a decedent's estate, in an action on a claim due the estate, which does not state that the claim sued on was filed

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by the administrator for the benefit of creditors, and fails to allege that any attempt was made by plaintiff to collect his debt, or that it was ever filed against the estate, does not state a cause of action.
p. 103.

DECEDENTS' ESTATES.—Desperate Claims.—Suit by Creditor.—Administrator De Bonis Non.—Where a claim due an estate never came into the possession of the administrator, and the administrator was discharged without administering on the claim, a creditor's remedy is through an administrator *de bonis non*, under §2395 Burns 1894, not by an action on the claim. *p. 103.*

From the Wells Circuit Court. *Reversed.*

A. N. Martin and *W. H. Eichhorn*, for appellant.

John Z. Brickley, for appellee.

ROBINSON, J.—Appellee, as an unpaid creditor of the estate of George W. Kreps, deceased, for himself and all the other heirs and creditors of such estate, sued appellee on two notes executed by one Hofstetter to appellant, and indorsed by appellant to decedent.

Section 2547 Burns 1894 provides that, under certain conditions named, an executor or administrator, with the approbation of the circuit court, may file certain claims due an estate in court, for the benefit of the creditors, heirs and legatees of the decedent; §2459, that any creditor or legatee whose debt or legacy, in whole or in part, remains unpaid, and any person entitled to share in the distribution of the estate, may sue for and recover such claim thus filed; §§2460, 2461, and 2462, how amounts thus collected shall be applied, compensation to the party suing for services in making the collection, and the giving of bond by the party suing; §2463, that a party entitled to sue may bring the action "in the name of the executor or administrator of the estate of the deceased, or otherwise, for his own use," but that neither such executor or administrator, nor the estate, shall be liable for costs.

Construing all these sections together it is evidently intended that such a suit may be brought while the estate is pending, or after a final settlement and discharge of the executor or administrator. If the suit is brought while the es-

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tate is pending it should probably be brought in the name of the executor or administrator, and the complaint should show that the claim had been filed with the court under §2457. In the case at bar it is averred that the estate has been finally adjudicated. Where an estate has been finally settled, a creditor whose debt remains in whole or in part unpaid may sue in his own name. After a final settlement and discharge of the executor or administrator, he can have nothing more to do with the estate in that capacity. The proceeds, when collected, are protected by the required bond. Appellee sues for himself and the other creditors and heirs, and when the judgment is rendered the statute provides for its disposition.

While appellee avers that he is an unpaid creditor, there is no showing in his complaint that he ever made any attempt to collect his claim, whether it was ever filed, and, if filed, what disposition was made of it; and, while the complaint shows that there was an administration of the estate in question, it does not show whether the claim sued on was administered or not. If it never came into the possession of the administrator, and was never administered, a creditor's remedy was through an administrator *de bonis non*, under §2395 Burns 1894. If appellee filed his claim against the estate, and it was allowed and partly paid, he might sue on a claim due the estate by showing that it had been administered and the disposition made of it as provided by §2457. Where claims due an estate have been administered and remain uncollected, a creditor's right to collect them follows by virtue of the statutory provisions above set out, and in order that he may maintain an action on such a claim, he must show that the statutory steps giving him that right have been taken. The complaint fails to state a cause of action in appellee's favor, and so failing it is bad against a demurrer although originally filed in the mayor's court. His right to recover depends upon a statute within which he must show himself to be when he sues.

Judgment reversed.

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[No. 2,847. Filed Oct. 24, 1899.]

APPEAL AND ERROR.—*Misjoinder of Causes of Action.*—A judgment will not be reversed on appeal on account of misjoinder of causes of action. p. 106.

MASTER AND SERVANT.—*Possession of Farmhouse.*—Where an employe has the use and occupancy of the farmhouse and garden of his employer as part remuneration for his services on the farm, his possession is that of his employer, and not an independent one. p. 107.

CONTRACT OF HIRE.—*Breach.*—*Recovery.*—*Quantum Meruit.*—*Master and Servant.*—Where an employe engaged in the proper performance of the contract is prevented from completing the stipulated service by his employer, in violation of the contract, he may recover the reasonable value of his work, not exceeding the contract price, upon a *quantum meruit*, or may sue upon the contract for the breach thereof. p. 108.

SAME.—*Breach.*—*Recovery.*—*Quantum Meruit.*—*Master and Servant.*—Where an employe has entered upon the service under a contract, and has performed work which has been accepted by the employer, but commits a breach of the contract, and is discharged, he cannot recover on the contract, but can sue only on the *quantum meruit*. pp. 108, 109.

From the Wells Circuit Court. *Reversed.*

J. S. Dailey, A. Simmons, F. C. Dailey and U. S. Lesh,
for appellant.

A. N. Martin and W. H. Eichhorn, for appellee.

BLACK, J.—The appellee's complaint contained two paragraphs. The first showed an indebtedness of the appellant to the appellee on account for work and labor, for certain articles sold and delivered and cash expended, and for board and lodging furnished for employes of the appellant, all at his special instance and request. In a bill of particulars filed with this paragraph was a charge of \$252, dated February 27, 1897, for one year's work on a farm. There were also other items of account for boarding furnished, articles sold, and cash paid, all prior to July 1, 1897.

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In the second paragraph it was alleged that on the 27th of February, 1897, the appellant hired the appellee to work upon the appellant's farm described, for a period of one year therefrom; that by the terms of the contract the appellee was to devote his time to doing farm work on said farm, to feeding and caring for a large number of cattle, hogs, and horses belonging to the appellant and kept on said farm; that, in consideration of appellee's promise so to devote his labor to appellant's services, the latter promised and agreed to pay the sum of \$252, to furnish the appellee a dwelling-house upon said farm, together with a garden, yard, and all necessary appurtenances; to give appellee the right to cultivate for his own use three truck patches for raising vegetables, and to furnish fire-wood for housekeeping. It was alleged that the value of the use of the dwelling-house for a year was \$60, that the value of the truck patches was \$90 per year, and that the value of the wood privilege was \$50 per year, all, with \$252 cash, aggregating \$452. It was also alleged that the appellant agreed to furnish and pay the appellee for one year's labor as aforesaid, from February 27, 1897, to February 27, 1898; that, pursuant to said agreement, appellee entered into possession of said dwelling-house, and planted his crops and vegetables upon said three patches, and until July 1, 1897, performed all work requested of him by the appellant, farmed for him, cared for and fed his live stock, and faithfully performed said contract; that on July 1, 1897, the appellant forcibly and unlawfully ejected appellee from said dwelling-house, discharged him from his service, refused to permit appellee longer to work for him, refused to furnish wood for appellee, and had taken forcible and unlawful possession of the truck patches so being cultivated by the appellee; that since his discharge appellee had been obliged to find another home for his family, had sought but had not found employment, and had been greatly damaged by the appellant's "breach of said contract;" and that the appellant was indebted to the appel-

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lee in the sum of \$452, the aggregate aforesaid, which was due and wholly unpaid; wherefore, etc.

The overruling of the appellant's motion to require the appellee to separate the several causes of action stated in the complaint, and to docket the same separately as separate causes of action, is assigned as error, and to some extent discussed by counsel for the appellant. Without regard to the question whether, as suggested in argument, the second paragraph is in tort, there could be no reversible error in the action of the court in overruling the motion. *File v. Springel*, 132 Ind. 312; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318.

To the first paragraph of complaint there was an answer of general denial and an answer of payment. There was an answer of set-off directed to the whole complaint. In a paragraph of answer addressed to the second paragraph of complaint the appellant set forth a special contract of hiring at certain stipulated wages per month, and alleged various violations of its terms, and failures and refusals to perform the duties thereunder on the part of the appellee; that on account of these breaches, the appellant discharged the appellee from the service on the 1st of July, 1897; and that before the commencement of this action (which was commenced on the 14th of July, 1897) the appellant fully paid the appellee all the wages and money due him on the contract mentioned in the second paragraph of complaint, up to and including the 1st of July, 1897. There was a reply in denial. No question is before us relating to the sufficiency of any of the pleadings.

A trial by jury resulted in a verdict for the appellee in the sum of \$185.86. Pending a motion for a new trial, the appellee remitted all of the amount of the verdict in excess of \$140, for which sum the court, having overruled the motion for a new trial, rendered judgment.

Before filing his answer, the appellant offered to allow judgment to be entered against him in the sum of \$105, and

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the question chiefly argued relates to the amount of recovery, and certain instructions of the court affecting that question.

The evidence showed that the appellee commenced his services upon the farm in February, 1896, and that in February, 1897, there was an agreement that he should continue for the second year upon the same terms of employment, as to which there was some conflict in the testimony. The appellee's employment on the farm consisted of general farm work, cultivating the crops, and caring for the live stock. It appeared that he was to have, and did have, the use of the dwelling-house on the farm, and a garden adjoining it; also that he was to cultivate and to have as a part of his remuneration, in addition to his cash wages, one-half the products of certain "truck patches" on the farm, the appellant to have the other half. The appellee also, pursuant to the contract, furnished boarding and lodging to the other farm hands and meals to the harvest hands, at stipulated prices to be paid him by the appellant. At the time of the appellee's discharge from the appellant's service, and expulsion from the farm, he had planted and cultivated the garden and truck patches, and the vegetables therein were almost but not quite sufficiently matured for him to commence the use thereof. By his discharge and expulsion and removal from the farm he lost the use of the products of the garden and truck patches.

The appellee occupied and used the house, garden, and truck patches, by way of remuneration in part for his services, and in the capacity, not of a tenant, but of a servant, for the benefit of the appellant, and necessarily for the convenient performance of the service of cultivating the farm and caring for the live stock and boarding the appellant's other employes. His possession was not independent of the appellant, but was the possession of the appellant through his servant. *Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782. If the appellant might rightfully discharge the appellee, and cause him to give up his employment on the farm, he might rightfully deprive him of the future occu-

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pancy and use of the house, garden, and truck patches. If the discharge of the appellee was wrongful, the deprivation of the use of the house, garden, and truck patches was a part of the appellee's loss through the wrongful discharge. In either case, whether the discharge was rightful, being for due cause, or was wrongful, and without adequate cause, there would be a question as to what damages, if any, might be recovered on account of the expulsion from the house, garden, and truck patches under proper pleadings.

The second paragraph of complaint, relating to the expulsion, was a complaint for breach of an express contract of hiring for an entire period of one year, at an agreed and express compensation, through the discharge of the employe before the expiration of the term for which he was employed, the employe having in all things performed his part of the contract, and the discharge being without cause and wrongful.

It is a rule that, where an employe engaged in the proper performance of the contract is prevented from completing the stipulated service by his employer, in violation of the contract, the employe may recover the reasonable value of his work, not exceeding the contract price, upon a *quantum meruit*, or may sue upon the contract for the breach thereof, and may recover such damages as will compensate him, including the value of his work and his loss, if any, suffered by reason of being prevented from completing the service. *Richardson v. Eagle Machine Works*, 78 Ind. 422; 41 Am. Rep. 584; *French v. Cunningham*, 149 Ind. 632; *Pape v. Lathrop*, 18 Ind. App. 633.

Where the employe has entered upon the service under a special contract, and has performed work which has been accepted and enjoyed by the employer, but has not completed the service, and has himself committed a breach of the contract, for which he has been discharged, he can not recover on the express contract, but can sue only on the *quantum meruit* and recover the amount in which the

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employer has been benefited upon his implied promise to pay the value of what he has received. *Everroad v. Schwartzkopf*, 123 Ind. 35; *French v. Cunningham, supra*; *Wolcott v. Yeager*, 11 Ind. 84. In an action on a special contract there cannot be a recovery on a *quantum meruit*. *Schaffner v. Kober*, 2 Ind. App. 409; *Pennington v. Nave*, 15 Ind. 323.

The evidence was conflicting upon the question as to the failure of the appellee properly to perform his duty under the contract, as to whether or not there was adequate cause for his discharge. In the instructions the court in various forms informed the jury that, if the evidence showed that the appellant had just cause to discharge the appellee from further service, the appellant would have no right to take possession of the garden and truck patches, and that if the appellant ejected the appellee therefrom he would be entitled in this action to recover the value at that time of the appellee's interest in the crops therein. If the appellee was rightfully discharged because of his breach of the express contract, he could not recover on that contract, and, whatever he might be entitled to recover under such facts as those presented in the court's instructions, he could recover only under a *quantum meruit*, which was not pleaded. If the instructions in question accurately stated a rule applicable to any case, they were not pertinent to the issues.

The judgment is reversed, and the cause is remanded for a new trial, with permission to the parties, upon application, to amend the pleadings.

CITY OF ALEXANDRIA v. BOARD OF COMMISSIONERS OF
MADISON COUNTY.

[No. 2,908. Filed October 24, 1899.]

PRISONS.—Care of County Prisoners by City.—County not Liable.—

A county is not liable to a city located in the county for the board of prisoners incarcerated in the city jail, nor for the expense of transporting such prisoners to the county jail.

From the Madison Circuit Court. *Affirmed.*

James A. May, for appellant.

M. A. Chipman, *S. M. Keltner*, and *E. E. Hendee*, for appellee.

HENLEY, J.—There are two novel questions presented by the record in this cause: (1) Is a county liable to a city located in said county for the board of prisoners incarcerated in a city jail? (2) Is a county liable to a city located in said county for the expense of transporting prisoners from the city to the county jail?

Appellant filed claims with the board of commissioners of Madison county for the board of certain prisoners incarcerated in appellant's jail, and for the expense of transporting certain prisoners from said jail to the county jail at Anderson in said county. These claims were, by the board of commissioners of said county, disallowed and rejected. Appellant thereupon brought this action in the circuit court of said county. The complaint is in three paragraphs. The first paragraph of complaint embraces both claims; the second seeks to recover only for the board of certain prisoners; the third only for their transportation from the city jail to the county jail. Appellee's demurrer for want of facts was sustained to each paragraph of the complaint.. The questions as above stated are squarely presented.

Section 3541 Burns 1894, subdivision 44, is cited by appellant's counsel. That subdivision of the statute provides

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that the common council shall have the power "to erect a prison or prisons within the limits of such city. And it shall be lawful to imprison therein persons convicted of offenses against the laws of such corporation, or for offenses against the penal laws of this State, and also persons charged with offenses punishable by indictment or presentment, temporarily, until they can conveniently be removed to the county jail. So far as the same may be applicable, the laws governing county jails shall be the laws of such city prison, and in all cases where the county jail is convenient, it may be used for city purposes until a city prison shall be erected." Under this statute it was very early held by the Supreme Court that the city, and not the county, was liable for the expense of keeping prisoners of the city in a county jail. *Board, etc., v. Chissom*, 7 Ind. 688. Under the law of this State it is made the duty of the sheriff of the county to receive, care for, and board the prisoners committed to the county jail; a fixed compensation is allowed him for all such services; no person other than the sheriff is authorized to do this work, and there is no statute permitting the board of county commissioners to pay any other person for such services. In the case of *Board, etc., v. Gresham*, 101 Ind. 53, it was said by Mitchell, J., speaking for the court: "That an individual is elected to the office of sheriff in a particular county, and because he thereby becomes *ex officio* the jailer of that county, and responsible for the care and custody of the prisoners confined in the jail which is provided and maintained by the law in that county, does not imply that the municipality shall come under any other obligation to him except that provided by the very terms of the statute. *The statute prescribes, specifically, the duties of the sheriff with respect to receiving and caring for prisoners confined in the county jail, and fixes the compensation which shall be paid him for receiving, discharging and boarding them, and when the county, through its board of commissioners, has provided a suitable jail, and maintains in it suitable furniture and appliances*

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for its proper keeping and pays the jailer the compensation specifically provided by statute, it has discharged its municipal obligation and exhausted its corporate power over the subject."

The obligation of allowing certain prisoners to be temporarily confined in a city jail until they can be transported to the county jail is an obligation imposed upon cities by the law making power, and the expense of caring for such prisoners must be paid by the city until they are delivered into the custody of the sheriff of the county.

It is a part of the duty of a constable or city marshal to commit to jail, by order of court, prisoners in their custody, and, for the discharge of such duty, compensation is allowed by statute. §§3511, 3512, 8060, 8061 Burns 1894.

In no event under the statutes of this State could the county be held liable for such services. The courts of this State have uniformly held that a board of county commissioners cannot exceed the statutory provisions in the discharge of their various duties. Appellant's learned counsel has failed to point out to us any statute, and we believe there is none, authorizing such an allowance as the one claimed in this action. We find no error in the record. Judgment affirmed.

CITY OF BLUFFTON v. MCAFEE.

[No. 2,851. Filed May 24, 1899. Rehearing denied Oct. 24, 1899.]

NEGLIGENCE.—*Knowledge of Danger.*—*Cities.*—The fact that plaintiff, a month before her injury, knew of a defect in a sidewalk is not inconsistent with a finding that she had no knowledge of it at the time of her injury. p. 115.

CONTRIBUTORY NEGLIGENCE.—*Personal Injuries.*—*Defective Sidewalk.*—*Cities.*—Plaintiff recovered a judgment for damages for injuries caused by a defective sidewalk. Answers to interrogatories showed that she was walking carefully along the sidewalk, wheeling a baby carriage in front of her, and stepped into a hole in the alley crossing and was injured; that she could see the walk within a distance of ten feet in front of her, but the hole was at the near side

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of the alley crossing, which was four inches lower than the sidewalk, and the view thereof was obstructed. *Held*, that the answers were not in conflict with the general verdict upon the question of contributory negligence. *pp.* 115, 116.

VERDICT.—*Answers to Interrogatories.*—*Presumptions.*—No presumptions will be indulged in favor of answers to interrogatories as against a general verdict. *p.* 116.

APPEAL AND ERROR.—*Weight of Evidence.*—Where there is evidence in support of the general verdict the Appellate Court will not disturb same on the weight of the evidence. *pp.* 116, 117.

LAW OF CASE.—*Subsequent Appeal.*—Where it is held on appeal that a party cannot recover on the facts disclosed, such decision is binding on a subsequent appeal if the facts remain the same; but if the facts are different, and warrant a different conclusion, the former decision is not conclusive on the subsequent appeal. *p.* 117.

EXCESSIVE DAMAGES.—*Review.*—The verdict of the jury in an action for damages on account of personal injuries will not be disturbed on appeal as excessive, unless the amount is so excessive as to indicate prejudice, partiality or corruption. *pp.* 117, 118.

From the Adams Circuit Court. *Affirmed.*

C. E. Sturgis, for appellant.

Levi Mock, John Mock, George Mock and France & Merryman, for appellee.

ROBINSON, J.—Appellee recovered a judgment for damages for injuries caused by a defective sidewalk. For the opinion upon the former appeal see *City of Bluffton v. McAfee*, 12 Ind. App. 490.

Wabash street in the city of Bluffton runs east and west, and is one of the principal streets of the city. On the south side of the street are the lots of W. S. Kapp and Mrs. Helms, separated by an alley. In front of these lots are sidewalks, and across the alley is a wooden crossing about four and one-half feet wide. Appellee was injured by stepping into a hole in this alley crossing as she passed onto it from the Kapp sidewalk. The jury found that appellee and a lady friend were walking along the Kapp walk approaching the alley crossing from the east, the friend walking on the south side of appellee; that the west end of the Kapp walk was four

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inches higher than the east end of the alley crossing where they joined; that there was a hole in the east end and north of the center of the crossing next to the sidewalk five inches wide; twelve inches long, four inches deep from the top of the crossing, and eight inches deep from the top of the sidewalk; that appellee was wheeling a baby carriage in front of her with her child therein as she was walking over the Kapp walk up to the crossing; that she was walking slowly and carefully, and was looking ahead at the walk as she came up to the hole; that she wheeled the carriage over the hole, the wheels going on either side; that she did not know of the dangerous condition of the place and did not know of the hole at the time; that she had passed over the walk but once during the year preceding the injury, which was about a month before, and knew of the defect at that time, but did not know of it when injured; that she was about twenty-one years old, had good eyesight, had lived in Bluffton all her life, and had lived for about a year within two squares of the place in question; that the accident happened about 2 o'clock on a bright, clear, July day; that the carriage prevented her from seeing the defect; that by looking over the carriage she could see the walk within a distance of ten feet in front of her; that as she approached the crossing she was looking straight ahead and at the sidewalk in front of her; that there were other obstructions besides the carriage between appellee and the defect; that appellee, as she approached the crossing, was walking in a slow and careful manner, but she did not know the defect was there; that she was not looking for the defect nor thinking of it; that the hole had been in the walk about six months before the accident, and for that length of time its condition was known to the mayor and street commissioner of the city; that appellee was permanently injured by the fall.

The answers to the interrogatories, and they are supported by the evidence, clearly establish the negligence of the city.

It is argued that appellant should have had judgment on the answers to interrogatories notwithstanding the general

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verdict. Whether appellee, at the time of the injury, knew of the defect was a fact for the jury to find, and they say she did not. This is in no sense inconsistent with the finding that she did know of the defect when she passed by it a month before. She might have known of it a month before, but that did not necessarily charge her with knowledge of it when injured. She was charged with no duty with reference to it, and the question was not whether she had at some prior time known of it, but whether she knew of it at the time of the injury.

It is further argued that the answers show that appellee did not think of the defect, was not looking for it, and was not trying to avoid it. This might all be true in view of the fact that she did not know there was such a defect. She could not be expected to be looking for a defect unless she knew one existed. She was bound to use care to avoid it if such existed, but she was not bound to anticipate that there would be a defect in the crossing. She was not required to keep her eyes constantly on the walk looking for obstructions. She had the right to presume, and to act on the presumption, that the street was reasonably safe for ordinary travel. The jury say that, by looking over the carriage, she could see the walk a distance of ten feet in front of her. But they also say there were other obstructions besides the carriage between her and the defect. Although she could see the walk ten feet in front of her, it does not necessarily follow that she could see the defect by looking over the carriage. When we look to the evidence we find what these other obstructions were. There was evidence that the crossing was made of planks laid lengthwise; that the hole was made by the end of one of these planks splitting off in a triangular shape, making the hole twelve or thirteen inches long, four or five inches wide next to Kapp's walk, and tapering to a point at the other end; that the end of the Kapp walk was about four inches higher than the crossing; that the hole was immediately next to and adjoining the end of the Kapp walk. Taking this

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evidence, it is self-evident that there were other obstructions besides the carriage which prevented her from seeing the defect, and that only a small part of the hole ever came within her range of vision, and that that part was visible only momentarily. Counsel cite the cases of *City of Bedford v. Neal*, 143 Ind. 425; *Town of Boswell v. Wakley*, 149 Ind. 64; *City of Plymouth v. Milner*, 117 Ind. 324; *Town of Gosport v. Evans*, 112 Ind. 133; *Rogers v. City of Bloomington*, 22 Ind. App. 601; *Brucker v. Town of Covington*, 69 Ind. 33, 35 Am. Rep. 202; *City of Indianapolis v. Cook*, 99 Ind. 10. In each of these cases the party injured knew of the defect at the time he approached it and was injured. The same is true of the case of *Pittman v. City of El Reno*, 4 Okl. 638, 46 Pac. 495, cited by counsel.

Appellee, when injured, was passing along one of the principal thoroughfares of the city, and had no reason to suspect there was a dangerous hole in her path. She was walking slowly and carefully, and was looking ahead at the walk as she came up to the crossing. There was nothing at the particular place to attract her attention. The fact that her attention was not directed to that particular part of the walk during the very short space of time she could have seen any part of the hole until it was entirely shut from view by the baby carriage can not raise any conclusive presumption of negligence against her. There is nothing in the special answers which shows she did anything a reasonably prudent person would not have done, or that she neglected to do anything such a person should have done.

We are unable to say that the special answers are in irreconcilable conflict with the general verdict upon the question of contributory negligence. It is a familiar rule that no presumptions will be indulged in favor of special answers. Appellee has the general verdict in her favor, which finds that she was not guilty of contributory negligence, and, as we construe the special answers, there is no conflict between them and the general verdict. There is evidence to support the

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general verdict, and, under the familiar rule, this court can not disturb the verdict upon the weight of the evidence.

When the case at bar was here on the former appeal it was reversed because the only care shown to have been exercised by appellee at the time was that she was walking slowly, and that this was not sufficient to support the averment that she passed over the crossing with due care and caution. It is seen that the facts disclosed by the record on this appeal are very materially different from the facts upon which the former appeal was decided. While the decision on the former appeal is the law of the case, it is the law of the case only upon such questions as were then presented. Where it is held that a party can not recover on the facts disclosed, such conclusion is binding on a subsequent appeal if the facts remain the same; but if the facts are different, and warrant a different conclusion, the former decision is not conclusive on the subsequent appeal. *Dodge v. Gaylord*, 53 Ind. 365; *Eckert v. Binkley*, 134 Ind. 614; *Ohio, etc., R. Co. v. Hill*, 7 Ind. App. 255.

It is argued that the damages are excessive. By the general verdict the jury awarded \$2,000. Appellee remitted \$300, and judgment was rendered for \$1,700. The jury answered that appellee received permanent injuries, and stated what the injuries were. There is evidence to support the jury's answer that the injuries are permanent. No good purpose could be subserved by setting out this evidence. The real question in such a case for an appellate tribunal is not whether in the opinion of the court the damages are excessive, but whether the jury have abused the discretion vested in them. The discretion vested in the jury will not be disturbed in cases of this character unless "the amount is so excessive or so grossly inadequate as to be indicative of prejudice, partiality, or corruption on the part of the jury." After a careful review of all the evidence upon this branch of the case, we can not say that the jury has in any sense abused the discretion vested in them. *City of Frankfort v. Cole-*

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man, 19 Ind. App. 368, and cases cited. *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 282.

Complaint is also made of the court's refusal to give a certain instruction. It is not shown by the record that the instructions requested and refused were ordered made part of the record and filed, nor have they been brought up in any bill of exceptions. Instructions that were given and that were refused are copied into the transcript. Even if the instructions requested were properly in the record, no question is presented upon the refusal to give certain instructions requested because it is not shown that the instructions set out were all the instructions given, and if the instructions refused were properly applicable, they may have been included in other instructions given, and this will be presumed. *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344.

Judgment affirmed.

SLOAN, ADMINISTRATOR, v. LOWDER ET AL.

[No. 2,883. Filed June 16, 1899. Rehearing denied Oct. 24, 1899.]

APPEAL AND ERROR.—Replevin.—Decedents' Estates.—An appeal by an administrator from a judgment in an action in replevin is not governed by §§2609, 2610 Burns 1894, relating to decedents' estates, where it was not a case growing out of a matter connected with the estate. *p. 119.*

VERDICT.—Special Findings.—Practice.—Where a general verdict was returned for plaintiff in an action in replevin, and the special findings were so antagonistic that a conclusion of law as to the ownership of the property could not be deducted therefrom, the general verdict must prevail. *p. 120.*

ABATEMENT.—Pleading.—No error was committed in sustaining a demurrer to an answer in abatement which alleged facts going to the merits of the cause, and not to its abatement. *p. 120, 121.*

From the Marion Superior Court. *Reversed.*

W. W. Spencer and *E. P. Ferris*, for appellant.

T. M. Clarke and *C. B. Clarke* for appellees.

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HENLEY, J.—This was an action in replevin, and was commenced by appellant to recover property consisting of a gold watch and chain, a phaeton, and a gold nugget. The appellant is the son and administrator of William Sloan, deceased. The appellee Parmenas C. Jacobs is the executor of the will of Mary Sloan, deceased, who was the wife of William Sloan and the mother of appellee Nettie Lowder. Appellee Joseph Lowder is the husband of said Nettie Lowder. Appellees have filed a motion to dismiss the cause, based upon §§2609 and 2610 Burns 1894. Appeals in actions like the case at bar are not governed by these sections. The action was brought by an administrator, and was not a case growing out of a matter connected with a decedent's estate. It is purely a civil proceeding under the code, and does not involve the exercise of probate jurisdiction by the court.

Appellees jointly answered in two paragraphs, the first paragraph being a general denial, the second averring ownership in another person of a part of the property sought to be recovered. The second paragraph of answer was not tested by a demurrer. Appellant replied in general denial. The cause was tried by a jury and a general verdict returned. The verdict was as follows: "We, the jury, find for the plaintiff [appellant], and that he is entitled to the possession of the following articles of personal property named in the complaint, to wit: One watch and chain, value twenty-two and fifty hundredths dollars, one phaeton, valued at twenty-five dollars; and we assess plaintiff's damages for the detention thereof in the sum of one cent; and as to the following articles of personal property named in the complaint, to wit, one gold nugget, value fifteen dollars, we find for the defendant." The jury also found the facts specially by way of answers to interrogatories. Appellees moved for judgment upon the special findings notwithstanding the general verdict. Appellant moved for judgment upon the verdict. The lower court sustained the motion of appellant "as to the watch and chain, and overruled said mo-

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tion as to the phaeton." The lower court sustained the motion of appellees for judgment upon the special findings, notwithstanding the general verdict, as to the phaeton, "and overruled said motion as to the watch and chain." The controversy as to the gold nugget seems to have been settled. Judgment was accordingly rendered.

It is the contention of appellant's counsel that the court erred in refusing to render judgment in appellant's favor upon the general verdict as returned by the jury. Interrogatory seventeen and answer thereto was as follows: "At the time of his death, was William Sloan the owner of the watch and chain in controversy? Ans. Yes." This would seem to settle the right of appellant as the legal representative of William Sloan, deceased, to the possession of the watch and chain; and as to the phaeton, we quote interrogatory nineteen, which was as follows: "At the time of his death, was William Sloan the owner of the phaeton in controversy? Ans. Yes." These answers certainly sustain the general verdict. Some of the other findings are antagonistic to the findings set out above. As a conclusion of law to be deduced from the special findings standing alone, the court would not be justified in finding that the ownership of the property belonged to either party to this action. The findings of fact being antagonistic destroy each other and leave the general verdict standing. *Wabash R. Co. v. Savage*, 110 Ind. 156; *Gates v. Scott*, 123 Ind. 459. If we strike out of the special findings, or do not consider the contradictory statements found therein, there is nothing left which is in irreconcilable conflict with the general verdict. *Peerless Stone Co. v. Wray*, 152 Ind. 27.

Appellees have assigned cross-errors questioning the action of the lower court in overruling the demurrer of appellees Lowder and Lowder to the complaint, and in sustaining the demurrer of appellant to appellees' plea in abatement. It is sufficient to say that the complaint avers every material fact necessary to a complaint in replevin; that the answer in

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abatement alleges facts which go to the merits of the cause, and not to its abatement.

Cause reversed, with instruction to render judgment upon the general verdict of the jury in favor of appellant.

NORTHWESTERN MASONIC AID ASSOCIATION v.
BODURTHA, GUARDIAN, ET AL.

[No. 2,832. Filed May 12, 1899. Rehearing denied Oct. 25, 1899.]

LIFE INSURANCE.—Warranties.—Breach.—Pleading.—Waiver.—Defendant filed answer seeking to avoid the payment of an insurance policy because of certain false representations made by the assured as to the condition of his health, and the breach of a promise contained in the application to abstain from the excessive use of intoxicating liquors. Plaintiff replied that defendant issued the policy and accepted premiums thereon with full knowledge that the answers in question were false. *Held*, that the reply was demurrable, since it should have averred that defendant had notice of the violation of the agreement not to use intoxicating liquors to excess, and, with such notice, accepted payment of premiums. *pp. 122-125.*

SAME.—Forfeiture.—Waiver by Agent.—Where the agent of an insurance company, authorized to solicit applications and collect premiums, continued to collect premiums from assured with knowledge of the fact that he was using intoxicating liquors to excess, in violation of the policy, such action amounted to a waiver of the right to declare a forfeiture, although such knowledge was not communicated to the company. *pp. 125-127.*

SAME.—Forfeiture.—Pleading.—An answer seeking to avoid the payment of a policy of insurance because of false statements made by assured in his application in regard to his health, need not show that the company was imposed upon by the false statements, or that it believed the statements were true, where the policy which was made part of the answer stated that it was issued in consideration of the representations, agreements and warranties made in the application. *pp. 127, 128.*

SAME.—Policy.—Warranty.—Use of Intoxicating Liquor to Excess.—An application for insurance containing questions and answers, the medical examiner's report and an agreement reciting that "the preceding statements and answers, and the application and this agreement are made part of the policy" form part of the insurance contract, and an agreement therein that the insured would abstain from

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the excessive use of intoxicating liquor, was a promissory warranty, and not the statement of an expectation. p. 128.

LIFE INSURANCE.—Warranty.—Forfeitures.—Use of Intoxicating Liquor to Excess.—The fact that an insurance company knew that assured was in the habit of drinking intoxicating liquor to excess prior to the issuance of the policy will not prevent the company from avoiding payment on account of a breach of a promissory warranty not to drink intoxicating liquor to excess. p. 129.

From the Miami Circuit Court. *Reversed.*

W. C. Bailey and *C. A. Cole*, for appellant.

W. E. Mowbray, *R. J. Loveland* and *H. P. Loveland*, for appellees.

COMSTOCK, J.—This action is based upon a certificate of membership or policy of life insurance issued by the appellant to Charles F. Bodurtha for the benefit of his children, who are the respective wards of appellees. The complaint was originally in three paragraphs, upon which issues were formed and evidence heard, but at the conclusion of the argument appellees were permitted to withdraw the first and third paragraphs. The issues upon which the cause was submitted to the jury were formed on the second paragraph of complaint, the answer and reply. The trial resulted in a verdict and judgment in favor of appellees for \$2,279.

The answer admits the execution of the policy in suit, the death of the insured, the appointment of appellees as guardians respectively of the minor children of the deceased, the furnishing of proofs of death, and the demand for the payment of the policy,—but seeks to avoid the payment because of false statements, breaches of certain warranties and covenants of the insured contained in the application for insurance, made a part of the policy, as to the health of and use of intoxicating liquors by the insured. Plaintiff replied, first, by general denial; second, affirmatively, that with full knowledge that the answers to the interrogatories in question were false, the association issued the policy to said Bodurtha, and accepted premiums thereon after it was known to

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its agents that he was violating his promise as to the future use of intoxicating liquor, and retained the premiums so paid.

Appellant claims, first, that the court erred in overruling its demurrer to the sixth paragraph of the reply, which paragraph is as follows: "The plaintiffs for further reply to the said defendant's answer, and to each and every paragraph thereof, say that for the purposes of this reply they admit all and singular the allegations of said answer and in each paragraph thereof, but say that with full notice and knowledge of the untruthfulness of answers in the application complained of in said answers of the association, and of such other matter complained of in said several paragraphs of answer, the defendant association accepted and approved the application of the said Charles F. Bodurtha, issued and delivered to him the policy sued on, and collected the premiums due thereon at the date of said policy, and all subsequent premiums which accrued thereon before the death of said Bodurtha." It avers, also, that no part of said premium was ever returned or tendered to the said Bodurtha, or to the plaintiffs, or either of them, but is still retained by said association. This reply is addressed to all the paragraphs of the answer. It must therefore be good as to all to withstand a demurrer.

The defense pleaded in the several paragraphs of answer is representations and warranties of certain false statements in his application for insurance and membership in the association, to the effect that he had never had disease of the heart nor rheumatism; that he had never used intoxicating liquors to excess; that he would not thereafter use intoxicating liquors to excess,—when, in fact, he had been afflicted with rheumatism, and had disease of the heart, as he knew, at the time of said application; that he had been in the habit of using intoxicating liquors to excess, and that, after the issuing of the policy, he used intoxicating liquors to excess, and that his death was caused, in part, by its excessive use; that the appellant was induced to enter into the contract of in-

surance by reason of the false statements, representations and promises of the insured.

The clause of the application referred to is as follows: "I further agree and warrant that I will not use intoxicating liquors to excess, nor practice any pernicious habit that obviously tends to shorten life; that if, after becoming a member of said association, I shall fail to pay any bimonthly premium or assessment on or before the day on which the same shall fall due, or fail to comply with this agreement, then, and in either event, my membership shall cease, and said certificate of membership or policy become void, and all moneys I shall have paid shall be forfeited to said association for its sole use and benefit."

The reply is pleaded as a waiver of the false representations and the breach of the promise to abstain from the excessive use of intoxicating liquors. It is claimed that in issuing the policy and accepting the premium with knowledge that the representations were untrue, appellant waived any defense on account of their falsity. This paragraph does not, however, aver that the association, after the execution of the policy, waived the breach of the promise of the insured not to use intoxicating liquors to excess, by accepting premiums after notice of such breach. The knowledge alleged to be in the possession of the association at the time of the issuance of the policy and the payment of the premium, that the representations made by the insured were false, must be held to apply to knowledge existing at those dates; it could not apply to the future conduct of the insured. To be good, the paragraph should have averred that appellant had notice of the violation of the agreement not to use intoxicating liquors to excess, and with such notice accepted payment of premiums. Construing, under the universally accepted rule of pleading, this paragraph most strongly against the pleader, such averments are wanting. The acceptance of premiums after the violation by the insured of a condition of the policy rendering it void must be

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with knowledge of such violation to estop the insurer to deny liability on account thereof. The insurer may be willing to assume a risk upon the life of one who has been intemperate in his habits, upon his promise to be temperate in the future. We have set out the clause in the application containing the agreement as to the future use of intoxicating liquors. By its terms, and the language of the policy, it is made a part of the contract. The policy reads: "In consideration of the representations, agreements, and warranties made in the application for this policy of insurance, which application is made a part of this contract," etc. The application contains two sets of questions to be answered by the applicant, one under "Form A", the other under "Form B". The agreement is under "Form B". Its first sentence is as follows: "I, the undersigned, hereby agree that each and all of the foregoing statements and answers in forms A and B, whether written by me or not, are material, and are warranted to be true, and that the foregoing application and this agreement are hereby made part of any certificate of membership or policy that may be issued pursuant thereto. *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593; *Mutual Benefit Ins. Co. v. Miller*, 39 Ind. 475. The court erred in overruling the demurrer.

Appellant next claims that the court erred in overruling its demurrer to the seventh paragraph of reply. This paragraph contains substantially the averments of the sixth, and alleges in addition that, before Bodurtha became a member of the appellant association, the insured, at the solicitation of Humerickhouse and Mills, who were agents of appellants, applied for membership in said association; that the defendant is a foreign corporation; that Humerickhouse and Mills were its only agents authorized to do business in Miami county, Indiana (in which county the insured resided), and that from that date on until after the death of the insured they continued to be its agents to solicit applications and collect premiums for said association; that, while acting as said

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agents, they knew that the insured was in the habit of using intoxicating liquors to excess after the date of the policy sued on, and was "at an institution for treatment for inebriety," and with knowledge of the fact that he was using intoxicating liquors to excess, and was being treated for inebriety, the association, by its agents, continued to collect for the association the premiums that accrued on the policy up to the time of his death, and have ever since retained the same.

The objection made to this paragraph is that it does not allege that the agents named communicated their knowledge to the company, or to any officer or any general agent, nor that they had authority to waive the forfeiture. It has been held in a number of cases that knowledge of the agent is knowledge of the company. In *Germania Life Ins. Co. v. Koehler*, 63 Ill. App. 188, it was held that an insurance company will be estopped from asserting a forfeiture of the policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it had failed to exercise, and instead treated the policy as in full force. In the case just mentioned the insured in violation of the policy had changed his residence and moved into prohibited territory without the consent of the company. Upon the trial of the cause the court instructed the jury, that, if a duly authorized agent of the company received such premiums after notice of such change of residence, and the company retained the same, then it became as much bound as if the premium had been paid directly at the home office in New York, and had been received there with a full knowledge of the change of residence; and this, regardless of whether the agent informed the company of the violation of the policy or not. The appellate court said: "The plaintiff in error contends this is not the law. Our supreme court is committed to the doctrine that such facts would constitute a waiver of the right to declare a forfeiture. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453; *Insurance Co. v. Sterger*, 124 Ill. 81, 16

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N. E. 95; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990."

Upon appeal to the supreme court the judgments of the trial and appellate courts were, in a well reasoned opinion, approved. See *Germania Ins. Co. v. Koehler*, 168 Ill. 293. 48 N. E. 297.

In *Newman v. Covenant Mut. Ins. Co.*, 76 Ia. 56, 40 N. W. 87, the policy declared on, as well as the application therefor, provided that if the insured should use alcoholic liquors so as to injure his health, the policy should be void; another clause of the policy provided that the company might cancel the policy if it found that the insured did so use alcoholic liquors. But the agent who took and forwarded the application, and who later received the premium, knew all the time that the insured was an habitual drunkard. It was held that there was a waiver of these conditions of the contract, and that the habitual drunkenness of the assured would not defeat the recovery on the policy.

Manifestly, knowledge of the agent was held to be knowledge of the company. See *Insurance Co. v. Wolff*, 95 U. S. 326, in which it was held that there was, under the facts, no waiver of the forfeiture; but the court said: "It is true, that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived." See *Miller v. Mutual Benefit Ins. Co.*, 31 Iowa, 216; *McEwen v. Montgomery Ins. Co.*, 5 Hill (N. Y.) 101; *Insurance Co. v. Combs*, 19 Ind. App. 331.

The questions presented by the remaining specifications of appellants assignment of errors may not arise upon a second trial, and we do not, therefore, consider them.

Appellees have assigned cross-errors, and we pass to their consideration. Appellees first question the sufficiency of the

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first paragraph of answer to the complaint. This paragraph seeks to avoid the policy because of false statements made by the assured in his application for insurance in regard to his health. It is contended that the answer fails to show that the defendant company was imposed upon by the false statements, or that it believed that they were true, and was thereby induced to execute the policy. These representations were material. The policy itself states that it was issued "In consideration of the representations agreements and warranties made in the application." The policy and application are made parts of this answer. It is a sufficient allegation of inducement. *Bacon on Benefit Societies*, §§209, 210, 212; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Cobb v. Covenant Mut. Assn.*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666. It is further claimed that this paragraph pleads a warranty and breach thereof, and that all that the warranty can be predicated upon is what is called an "agreement" attached to the application. Appellees claim that this agreement is not a part of the policy contract. The application for membership and answers to questions, the "agreement", the medical examiner's report, are all one paper, executed at the same time. The agreement is signed by the insured, the medical report following by the examiner, and the whole indorsed "Application to the Northwestern Masonic Aid Association." The agreement recites that the preceding statements and answers, and the application, and this agreement are made part of the policy. We are clearly of the opinion that the application, including the "agreement", forms a part of the insurance contract, and that the agreement of the insured that he would abstain from the excessive use of intoxicating liquor was a promissory warranty, and not, as counsel for appellees contend, the statement of an expectation. In this ruling the court did not err.

The second, third, fourth, and fifth specifications of cross-errors relate to the second, third, fourth, and fifth paragraphs

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of answer, and present substantially the same questions raised by the first cross-error, and what we have said with reference to the first cross-error applies to them. In these rulings there was no error.

Appellees next discuss the action of the court in sustaining the demurrer to the fifth paragraph of reply. The paragraph of answer to which this paragraph of reply is addressed pleads a promissory warranty, in that said Bodurtha in his application for insurance agreed and warranted that he would not use intoxicating liquors to excess, and it avers as a breach of said warranty that, after the issuing of the policy, he did use intoxicating liquors to excess until he became a physical wreck, and that such dissipation contributed to his death. The reply to this answer avers that before the date of said application, and before the issuing of the policy, the said Bodurtha had used intoxicants to excess to such an extent as to render him diseased from such dissipation, which disease affected him at the time of said application, of which fact the said association had knowledge at the time of the application, and thereafter, before the issuing and delivery of the policy; that the deceased's condition continued until his death, and his return to such dissipation was merely a recurrence of the disease, over which he had no control. Appellees' counsel quote from eminent writers on medical jurisprudence, showing that drunkenness is a disease, that it is liable to occur periodically, and argue from these facts that the company, knowing that Bodurtha was diseased, and the cause of it, having issued the policy, cannot now honestly refuse payment. We think it would be a dangerous precedent to hold that the deplorable conditions, physical and mental, which are likely to follow the immoderate use of intoxicants, should preclude business transactions with one who in the past may have been the victim of the habit but, who promises to be temperate in the future, and to release such party from the obligations of a valid contract because of his failure to keep this promise.

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Specifications nineteen, twenty, and twenty-eight, of the assignment of cross-errors relate to the refusing to give, and the giving of certain instructions. They are not the basis of an independent specification of error, and do not therefore present any question for review.

We are not unmindful of the rule that forfeitures are not favored in law, and that the insurance company is asking the enforcement of a rule which is, ordinarily, a harsh one, while it retains the premiums for which the insurance was carried. But the courts do declare forfeitures when the insurer is clearly entitled thereto. In the case before us the terms of the contract are plain. It was deliberately made. The parties were competent to enter into it. It contravenes no rule of law, and we see no reason why it should not be enforced. *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 55 N. W. 188; *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. 833; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151, 157; *Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Crikelair v. Citizens Ins. Co.*, 168 Ill. 309, 48 N. E. 167; *Northwestern Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, and authorities there cited.

Reversed, with instructions to the trial court to sustain appellant's demurrer to the sixth paragraph of reply, and for proceedings not inconsistent with this opinion.

Wiley, J., took no part.

THE SPRINGFIELD ENGINE AND THRESHER COMPANY
v. MICHENER.

[No. 2,897. Filed October 26, 1899.]

JUDGMENTS.—Review.—Pleading.—Limitation of Actions.—Where an amended complaint seeking to review a judgment does not set up any right not asserted in the original complaint asking for equitable relief from the judgment by way of injunction, an answer that the cause of action mentioned in the amended complaint did not accrue

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within the time limited by statute is an argumentative denial, stating a legal conclusion, and is bad on demurrer. *pp. 131-134.*

JUDGMENTS.—*Review.*—In an action to review a judgment on account of new matter discovered after the rendition thereof, it appeared by the special findings that plaintiff, as agent for defendant, sold a threshing machine, and indorsed the notes taken in payment therefor, it being understood by the parties at the time that plaintiff was to guarantee the payment of all notes where the makers had no defense to the same. Defendant brought suit on the notes, and plaintiff, having no notice or knowledge that the makers had any defense thereto, suffered himself to be defaulted, and the makers were released by the subsequent judgment of the court in the same action. *Held*, that plaintiff was entitled to have the judgment against him reviewed. *pp. 134-139.*

From the Howard Circuit Court. *Affirmed.*

B. C. Moon, J. C. Blackledge, C. C. Shirley and C. Wolf,
for appellant.

L. J. Kirkpatrick, J. F. Morrison and T. C. McReynolds,
for appellee.

BLACK, J.—On the 14th of June, 1892, the appellee filed in the court below his complaint against the appellant and Edgar A. Simmons, sheriff, concerning which the Supreme Court, in *Michener v. Springfield, etc., Co.*, 142 Ind. 130, 137, 31 L. R. A. 59, said: “The general prayer for relief was broad enough in this case to have justified the court in awarding the legal relief of a review of” a certain judgment therein referred to and described, which was rendered in favor of the appellant herein against the appellee herein, upon his default, on the 12th of July, 1890, “and the facts stated in the complaint only lacked one element to entitle the plaintiff [the appellee herein] to the legal relief of a review, and that was to file a transcript of the record of the judgment referred to and described in the complaint. The facts stated did not entitle the plaintiff to equitable relief by way of injunction, because they show that he had an ample legal remedy by review but did not as before observed justify the dismissal. It did not state facts sufficient to warrant the legal relief by way of review, because it did

not set forth as an exhibit thereto a complete transcript of the judgment or so much thereof as is necessary to fully present the error complained of. * * * For that reason the court ought to have sustained the demurrer to the complaint and allowed the plaintiff to amend his complaint in this respect if he so desired." And the court reversed the judgment and remanded the cause with instruction to overrule the motion of the defendants to dismiss, and to sustain the demurrer to the complaint, with leave to the plaintiff to amend his complaint, if he should so desire. A petition for a rehearing was overruled in that case September 26, 1895.

On the 30th of October, 1895, the appellee filed an amended complaint, and on the 6th of April, 1897, the appellee, with leave of court, filed his amended complaint against the appellant in two paragraphs. A demurrer to each of these paragraphs for want of sufficient facts was overruled. Each paragraph stated substantially all the facts contained in the complaint which the Supreme Court held to be not so defective as a complaint for review that it might not be amended and made sufficient by setting forth as an exhibit thereto a transcript of the judgment to be reviewed. Each paragraph of the amended complaint contained some averments additional to those of the original complaint, and was modeled as a complaint for review, and a transcript of the judgment to be reviewed was set forth as required by the Supreme Court. There could be no available error in the action of the court in holding each paragraph of the complaint sufficient on demurrer.

There was an answer of general denial, and there was also a second paragraph of answer, a demurrer to which was sustained. In this second paragraph, addressed to each paragraph of the amended complaint, it was alleged "that the plaintiff's cause of action alleged in each of said paragraphs accrued more than three years before the bringing of this action to review the judgment described in each paragraph of said complaint."

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In *Rosa v. Prather*, 103 Ind. 191, it was said that the statutory method of obtaining a review of a judgment is a special proceeding to which the various statutes of limitations affecting other actions and proceedings have no application; and that the only limitations applicable to such a proceeding are those contained in the statute providing for the proceeding.

In such a case as the one before us, which was a proceeding for review for material new matter discovered since the rendition of the judgment, the period within which the complaint for review may be filed, as provided by the statute, is "within three years" after the rendition of the judgment, except that any person under legal disabilities may file such a complaint at any time within one year after the disability is removed. §§627, 628 Burns 1894, §§615, 616 Horner 1897.

In *Rosa v. Prather*, 103 Ind. 191, it was held that there was no error in sustaining demurrers to certain replies addressed to the second and third paragraphs of answer. The form of the second paragraph of answer, as stated in the opinion of the Supreme Court, was: "That the judgment complained of was not rendered within one year before the time of the commencement of this proceeding." The third paragraph was stated to be "that said judgment was not rendered within three years before this proceeding was commenced." No question was suggested as to the form of these answers.

In *Indianapolis, etc., R. Co. v. Center Tp.*, 130 Ind. 89, an answer averred that the money for the recovery of which the suit was prosecuted was paid to the township more than six years before the filing of the amended complaint in that cause. It was said by the Supreme Court, by way of objection to this pleading, that it was not averred therein that the cause of action did not accrue within six years next before the commencement of the action, and that the issue tendered by it was immaterial, "as the vital time is the commencement of the action."

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Where the amended complaint does not set up any right not asserted in the original complaint, the answer that the cause of action mentioned in the amended complaint did not accrue within the time limited by the statute is bad on demurrer. *Evans v. Nealis*, 69 Ind. 148.

The appellant's second paragraph of answer was to the effect that the cause of action alleged in the amended complaint accrued more than three years before the bringing of this action as an action to review the judgment. This was not improperly treated by the court as an argumentative pleading, stating a legal conclusion. It was not alleged that the judgment was not rendered within three years before this proceeding was commenced, or before the filing of the complaint, or that the cause of action stated in the amended complaint did not accrue within three years before the commencement of this proceeding or before the filing of the complaint.

It must be held by us, following the Supreme Court, that the cause of action stated in the amended complaint was not a different one from that for which the proceeding was commenced in 1892, notwithstanding the differences which we have noted; and where this is true the amended complaint is not subject to attack by the statute of limitations. If by a comparison of the original and the amended complaints it appears that the latter does not declare upon a cause of action different from that stated in the former, filed in due time, it has been held that a demurrer to an answer of the statute of limitations, though pleaded in proper form to the amended complaint, should be sustained. See *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657. This would seem to be a reasonable rule; at least, where it appears from the record, as it does here, that no right of a party has been abridged by a ruling of the court, there can be no available error in the ruling.

The court rendered a special finding, stating the facts substantially as follows: The appellant, a foreign corpora-

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tion, through its agent, the appellee, sold to John H. Kennedy, Benjamin Hochstedler, and Christian Kly a certain steam vibrator separator, and its appliances, manufactured by the appellant, at the price of \$415, to be paid as follows: \$140 December 1, 1888, \$137.50 December 1, 1889, and \$137.50 December 1, 1890. The appellant so sold the machine upon a warranty that it was well and properly made of good material, and that it would do as good work as other machines of like size in use throughout the country. On the day of said sale the three purchasers above named executed to the appellant their three promissory notes in settlement for the machine, for the amounts, and due at the dates above mentioned. At the time of executing these notes, the three makers thereof, to secure the payment of the notes, executed to the appellant a chattel mortgage upon said machine and other property, which was duly recorded in the recorder's office of said Howard county, wherein the mortgagors resided. Upon the execution of the notes and mortgage, the appellee wrote his name on the back of each of the notes, which was done in accordance with the requirements of his contract of agency, and in no other or different capacity, and for no other or different purpose. No part of the consideration for the notes or either of them was received by the appellee, and it was understood at the time by both the appellant and the appellee that the latter was to guarantee the payment of all notes where the "payees" had no defense to the same. Afterward, and before the 11th of April, 1890, the three makers of the notes paid the appellant the \$140 note. On the 4th of April, 1890, the appellant filed a complaint in the court below against said three makers, as such, upon the two notes for \$137.50 each, making the appellee a defendant as an indorser on each of the notes, and seeking the foreclosure of the chattel mortgage, being cause numbered 9,469 in the court below. Summons for the second day of the May term, 1890, of said court, was duly issued, served, and returned in said cause 9,469. On the 9th of

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June, 1890, the appellee was duly called and made default, and, on the 12th of July, 1890, judgment upon said default was rendered against the appellee as indorser upon said notes for \$339.08, and costs taxed at \$21.90, and the cause was continued as to the other defendants therein, who, on the 4th of June, 1890, as makers of the notes and mortgage, appeared in said cause and filed their answers; and afterward they filed amended answers, wherein they admitted the execution of the notes and mortgage, as alleged in the complaint, but averred, amongst other defenses, that said machinery was sold to them by the appellant upon a written warranty, by which the appellant warranted to the three makers of said notes that said machine was made of good material, and would do as good work as any other separator or threshing machine of like size in use throughout the country; and said defendants averred in their said answers that said separator was not well made, that it was made of poor material, was defective in its construction, and would not do as good work in threshing as other machines of like size in use throughout the country; that by reason of its defective construction it would not thresh wheat clean, that it cut the threshed grain and blew the wheat over, and carried the threshed wheat with the chaff and straw; that with the best care and management it could not be made to thresh wheat as well as other separators of like size in use throughout the country; that, by reason of its being poorly and improperly constructed and made of poor material, it was worthless and of no value as a threshing machine for the purposes for which it was manufactured and bought and sold; that by reason of its being made of poor material and improperly constructed the consideration for the execution of each of said notes and chattel mortgage had entirely failed, and by reason thereof said defendants were not liable to the appellant on said notes and mortgage in any sum whatever; and said defendants demanded judgment for their costs. To this answer the appellant filed its reply in general denial, and the cause being

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at issue and called for trial, it was on the 23rd of March, 1892, submitted to the court for trial. The court for its information submitted certain questions of fact to a jury, whereupon the court at the request of the parties to the suit made a special finding of facts and announced its conclusions of law thereon, in which special finding the court found for the defendants, that the consideration for the execution of each of said notes involved in said suit executed by said Kennedy, Hochstedler, and Kly to the appellant, and indorsed by the appellee, had wholly failed by reason of inherent defects in the construction of said separator, and on account of the poor material used therein. On the 16th of April, 1892, the court in said cause found and adjudged that said Kennedy, Hochstedler, and Kly, as the makers and payors of said notes, were not liable thereon, and found as its conclusions of law upon the facts found in said cause that the consideration for each of the notes had wholly failed, and that said three defendants were entitled to judgment for their costs, and at said date the court rendered judgment upon said special finding of facts and conclusions of law, in which judgment it was adjudged that the plaintiff in said cause, the appellant here, take nothing of said three makers of said notes, and that they recover their costs. The appellee, Michener, when said default was taken and judgment was rendered against him, had no notice or knowledge whatever that said Kennedy, Hochstedler, and Kly, or either of them, as makers of said notes, had any defense against the notes or either of them by reason of failure of the consideration thereof, or that said separator was made of poor material and was improperly made, or would or could not be made to do as good work as other separators of like size in use throughout the country, and had no notice or knowledge that said makers, or either of them, had or intended to make any defense in said action against the payment of the notes or either of them, and had no notice or knowledge that said other defendants in said action would be discharged from liability

on account of the execution of the notes by reason of any inherent defect in the construction of said machine, or for any other reason; but he knew that said makers of the notes were complaining that the machine was not doing good work. It was stated in the special finding that, after the rendition of said judgment in favor of the three makers of the notes, the appellee, within a reasonable time proceeded to prepare and file his complaint in said cause in said court, and, in the preparation, bringing, and prosecution of this suit to be relieved from said judgment so rendered against him as indorser, exercised due diligence. After said judgment in favor of said three makers of the notes, the plaintiff in that suit, the appellant here, appealed from said judgment to this court, and upon the submission and hearing of the cause in this court, said judgment of the Howard Circuit Court was in all things affirmed on the 27th of September, 1893, which judgment remains in full force and effect.

The court upon the foregoing findings stated a conclusion of law in favor of the appellee for the review of the judgment rendered against him upon default. The appellant excepted to the court's conclusion of law.

The material new matter discovered after the rendition on the 12th of July, 1890, of the judgment against the appellee, for which the review of the judgment was sought, was the release of the makers of the note by the judgment rendered on the 16th of April, 1892, in their favor in the same cause.

It appears from the record before us that this proceeding was commenced in the next term of court, on the 14th of June, 1892. The special finding contains some conclusions of law, yet we think it sufficiently appears from the record that there was a fulfilment of the requirement of the statute, §629 Burns 1894, §617 Horner 1897, that the new matter could not have been discovered before judgment, and the complaint was filed without delay after the discovery.

It appears that the appellee was an indorser, and that the consideration for the notes was received by the makers and

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that there was an entire failure of consideration, for which the makers were released by the subsequent judgment of the court in the same action in which the judgment had been rendered against the appellee as indorser. The principals were discharged for matters inherent in the transaction. This would entitle the appellee to his discharge from his liability upon the notes; and therefore the special finding, sufficiently covering the issue submitted for trial, and sustained by the evidence, showed the appellee's right to have the judgment against him reviewed. *Michener v. Springfield, etc., Co.*, 142 Ind. 130, 31 L. R. A. 59.

We have not found any available error in the record. Judgment affirmed.

CITY OF INDIANAPOLIS v. TURNER.

[No. 2,840. Filed October 27, 1899.]

APPEAL AND ERROR.—Assignments of Error.—Waiver.—Assignments of error which are not discussed are waived. p. 140.

SAME.—Record.—Omissions.—Supplied by Agreement.—The record on appeal must be founded upon proceedings actually had in a trial court, and an omission from the record of a material matter cannot be supplied by an agreement between the parties made after the trial of the cause. pp. 140, 141.

From the Marion Superior Court. *Affirmed.*

J. W. Kern and *J. E. Bell*, for appellant.

L. M. Harvey, *W. A. Pickens*, *L. A. Cox* and *S. W. Kahn*, for appellee.

COMSTOCK, C. J.—Appellee was the plaintiff below and brought her action against appellant to recover damages on account of an injury to her person which she claims to have received in passing over a defective sidewalk at the junction of Highland Place and Twelfth street, in the city of Indianapolis, on Sunday evening, November 28, 1895. The cause was put at issue by general denial. Its trial resulted in a verdict and judgment in her favor for \$500.

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The only specification of the assignment of errors discussed is the action of the court in overruling appellant's motion for a new trial; the others are therefore considered waived.

Counsel for appellee ask the court to determine whether the evidence is in the record (contending that it is not) before passing upon its sufficiency. The question is based upon the following proceedings shown by the record: "Mr. Pickens: I now offer in evidence an ordinance annexing certain territory to the city of Indianapolis, approved September 15, 1892. The said ordinance was admitted in evidence and was omitted from the transcript by agreement of counsel. The said agreement of counsel being found on page 190 of this transcript." It is signed by counsel for appellant and appellee, and is as follows: "State of Indiana, Marion county, ss. In the Superior Court. R. 1. No. 51,134. Vinnie Turner v. City of Indianapolis. For the purpose of facilitating the work of preparing a transcript of the evidence given at the trial of the above entitled cause, it is agreed by and between the parties thereto that the official stenographer in making such transcript shall omit therefrom the ordinances defining the corporate limits of the defendant city of Indianapolis, introduced in evidence at the trial of the said cause, as it is agreed by and between the parties to said action that the point where said injury is alleged to have occurred was within the corporate limits of the said defendant city of Indianapolis, at the time of said injury." This is an agreement as to an essential fact, to wit, that the place of the accident was within the corporate limits of the city of Indianapolis.

It affirmatively appears that the ordinance which was introduced has been omitted from the transcript. It is manifest that the agreement was made after the trial of the cause. "Records upon which appellate tribunals try appeals must be founded upon proceedings actually had in a trial court, and parties can not make a record by agreement where no such

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proceedings have been had." Elliott App. Proc., §187. See, also, *Davis v. Union Trust Co.*, 150 Ind. 46; *Blair v. Currey*, 150 Ind. 99; *John Church Co. v. Spurrier*, 20 Ind. App. 39.

The evidence is not in the record, and, as the questions presented by appellant's counsel depend upon the examination of the evidence, we must hold that no error is shown. The judgment is affirmed.

**CITY OF GREENSBURG v. CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY COMPANY.**

[No. 3,098. Filed October 27, 1899.]

ACTION.—Violation of City Ordinance.—An action to recover a penalty for the violation of a city ordinance is a civil action and the rules of practice in civil suits apply. pp. 141, 142.

APPEAL AND ERROR.—Appellate Court.—Jurisdiction.—An appeal cannot be taken to the Appellate Court in an action originating before the mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed \$50. p. 142.

From the Decatur Circuit Court. *Appeal dismissed.*

H. C. Skillman, for appellant.

John T. Dye and *Cortez Ewing*, for appellee.

ROBINSON, J.—Appellant sued appellee before the mayor of a city, and in that court recovered a judgment of \$10 in the nature of a penalty for violation of a city ordinance regulating the speed of trains. Appellee appealed to the circuit court, and a trial resulted in a judgment in appellant's favor for \$1. Upon motion of appellee, costs were taxed against appellant, and this action of the court is the only error assigned.

Appellee has filed a motion to dismiss the appeal because the action originated before the mayor of a city and the amount in controversy was less than \$50, exclusive of interest and costs. It appears from the record that the validity of an ordinance is not involved.

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The action brought by appellant is a civil action, and the rules of practice in civil suits apply. *City of Hammond v. New York, etc., R. Co.*, 5 Ind. App. 526, and cases cited.

The act creating the Appellate Court does not assume to define appellate jurisdiction generally, but simply the jurisdiction of that court. If appellate jurisdiction is invoked, it is in the Supreme Court, unless the case falls within one of the classes jurisdiction over which is placed in the Appellate Court by the act creating it. That is to say, an appeal can be taken to the Appellate Court in no case that could not have been appealed to the Supreme Court prior to the act creating the Appellate Court. That act did not enlarge or extend appellate jurisdiction. §1336, *et seq.*, Burns 1894.

Prior to the creation of the Appellate Court an appeal could not have been taken to the Supreme Court in an action originating before the mayor of a city where the amount in controversy, exclusive of interest and costs, did not exceed \$50. §644 Burns 1894. As the statute creating this court did not enlarge general appellate jurisdiction, it follows that an appeal to this court in a case like this will not lie. See *Ex Parte Sweeney*, 126 Ind. 583; *Clinton Tp. v. DeHaven*, 22 Ind. App. 280; *Ridge v. City of Crawfordsville*, 4 Ind. App. 513.

Appeal dismissed.

DISSENTING OPINION.

BLACK, J.—The Supreme Court has jurisdictions in appeals under such regulations and restrictions as may be prescribed by law. Constitution of Indiana, article 7, §4. By the statute, §644 Burns 1894, §632 Horner 1897, it is provided: "Appeals may be taken from the circuit courts and superior courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars. *Provided, however, That this exception*

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shall not apply to prohibit an appeal in cases originating before a justice of the peace or mayor of a city, involving the validity of an ordinance passed by an incorporated town or city." This statute, it is hardly necessary to say, relates to the jurisdiction of the Supreme Court alone. It was enacted long before the creation of the Appellate Court. At different times the statutes have prescribed various sums as the amount which must be in controversy in actions originating before justices or mayors to authorize an appeal to the Supreme Court.

The act creating the Appellate Court and the acts amendatory thereof and supplementary thereto have conferred upon this court the jurisdiction which it possesses. We are to look to those statutes for our authority, and not to the statute above quoted regulating and restricting the jurisdiction of the Supreme Court.

The Appellate Court, by the amendatory statute of 1893, is given "exclusive jurisdiction, subject to the exceptions hereinafter designated, of appeals from the circuit, superior, and criminal courts, in the following classes of cases: * * * Second. All appeals from judgments rendered in cases which originated before a justice of the peace, and in which the amount in controversy, exclusive of interest and costs, exceeds fifty dollars. Third. All action seeking the recovery of a money judgment only, where the amount in controversy, exclusive of costs, does not exceed thirty-five hundred dollars. * * * The Appellate Court shall not have jurisdiction of any case where the constitutionality of a statute, federal or state, or the validity of an ordinance of a municipal corporation is in question and such question is duly presented." §1336 Burns 1894, §6562a Horner 1897.

In the original act creating the Appellate Court, of which the above mentioned statute of 1893 was amendatory, the court was given jurisdiction of all appeals from the circuit, superior and criminal courts, in cases originating before a

justice of the peace "where the amount in controversy exceeds fifty dollars (\$50) exclusive of costs," not including the words "interest and," which are included in the amendatory act of 1893 and in the above quoted §632 relating to the Supreme Court. While the Appellate Court now has exclusive jurisdiction of such appeals in cases originating before a justice of the peace as were immediately before its creation within the jurisdiction of the Supreme Court, yet, under the above mentioned act of 1891, the Appellate Court might take jurisdiction in a case so originating if the amount in controversy including interest, but excluding costs, exceeded \$50, while under the amendatory statute of 1893 the amount in controversy must exceed \$50 exclusive of both interest and costs, as was true of the Supreme Court under the above quoted provisions of §632.

Not only did the act creating this court give it jurisdiction of a class of cases originating before a justice of which the Supreme Court did not then have jurisdiction, but that act, like the amendment of 1893, did not except from the jurisdiction of this court, as was excepted from the jurisdiction of the Supreme Court, actions originating before a mayor because of the smallness of the amount in controversy. Such actions, like those originating before a board of county commissioners, were included in "all actions seeking the recovery of a money judgment only, where the amount in controversy exclusive of costs does not exceed thirty-five hundred dollars," unless the constitutionality of a statute or the validity of a municipal ordinance be properly brought in question.

Shea v. City of Muncie, 148 Ind. 14, was an action commenced before the mayor of the city of Muncie to recover a penalty for the violation of an ordinance of the city. On appeal, the circuit court rendered judgment against the defendant for \$1. On appeal by the defendant to the Supreme Court, that court retained jurisdiction, the validity of the ordinance being in question, and affirmed the judgment of the circuit court. See, also, *City of Indianapolis v.*

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Consumers, etc., Co., 140 Ind. 107, 27 L. R. A. 514; *City of South Bend v. Martin*, 142 Ind. 31, 29 L. R. A. 531.

City of Hammond v. New York, etc., R. Co., 5 Ind. App. 526, was an action commenced before the mayor of a city to recover the penalty for running a train at a greater rate of speed than six miles per hour in violation of a city ordinance, which prescribed a penalty in any sum not exceeding \$100. There was a judgment before the mayor against the defendant for the \$100. On appeal there was judgment in the Porter Circuit Court for the defendant. The cause was appealed by the city to the Supreme Court, and that court transferred it to this for the expressed reason that "actions for the recovery of money, with all their inseparable incidents, are within the jurisdiction of the Appellate Court except where the validity of a statute is involved." *City of Hammond v. New York, etc., R. Co.*, 126 Ind. 597. In this court the judgment of the circuit court was reversed, and a part of the mandate was that the court below render judgment for the city for such amount as the court might deem proper upon the evidence, not exceeding \$100. *City of Hammond v. New York, etc., R. Co.*, 5 Ind. App. 526, 538. The Supreme Court in transferring the cause, for the reason that it was an action for the recovery of money, cited *Parker v. Indianapolis National Bank*, 126 Ind. 595, and *Baker v. Groves*, 126 Ind. 593, in both of which the action of the Supreme Court in transferring to the Appellate Court was referred to the clause of the statute relating to this court which gave it jurisdiction of "all cases for the recovery of money only," etc.

In *Board, etc., v. Binford*, 70 Ind. 208, the cause originated before a board of county commissioners, the amount in controversy being \$24. The court refused to dismiss the appeal, basing its right to retain jurisdiction upon the statutory provision of March 14th, 1877: "Appeals may be taken from the circuit courts and superior courts, * * *

by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars." The court said: "This case did not originate before a justice of the peace or the mayor of a city; hence, by the unequivocal terms of the statute, an appeal lies to this court, though the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars."

Berkey v. City of Elkhart, 141 Ind. 408, was a cause which originated in a city court. The judgment of the circuit court was in favor of the plaintiff for \$10. On appeal by the defendant to the Supreme Court, the cause was transferred to this court.

In *Town of North Manchester v. Oustal*, 132 Ind. 8, the appellant was the plaintiff and sought to recover \$20 for violation of its ordinance, the action being one commenced before a justice of the peace. The Supreme Court dismissed the appeal.

Lake Erie, etc., R. Co. v. City of Noblesville, 15 Ind. App. 697, was an action to recover a penalty for violation of a city ordinance forbidding the running of trains within the corporate limits at a rate of speed exceeding six miles an hour. It appears from the record of the cause that the action was commenced before the mayor of the city, and from the judgment rendered in this court against the defendant for the sum of \$5 and costs the defendant appealed to the circuit court of Hamilton county whence the venue was changed to the Clinton Circuit Court, by which judgment was rendered against the defendant for \$5 and costs. From this judgment the defendant appealed to the Supreme Court, and at its May term, 1896, that court transferred the cause to this court, where it was decided upon its merits, the judgment of the Clinton Circuit Court being affirmed.

In *Lake Erie, etc., R. Co. v. City of Noblesville*, 16 Ind. App. 20, the action originated before a mayor, and in the

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circuit court the judgment was in favor of the plaintiff for \$20. The appeal was taken by the defendant to the Supreme Court, and by that court, at its May term, 1896, the cause was transferred to this court, by which the judgment was affirmed.

Ridge v. City of Crawfordsville, 4 Ind. App. 513, was an appeal by the defendant in an action which originated before a mayor, the judgment of the circuit court being in favor of the plaintiff for \$10 and costs. This court dismissed the appeal. The court said: "§632 R. S. 1881, provides for appeals to the Supreme and Appellate Courts from all final judgments of circuit and superior courts, except in cases originating before a mayor or justice of the peace, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars." This was plainly an oversight, for the statute to which reference was thus made, as already observed, was enacted long before the creation of the Appellate Court. The decision is plainly in conflict with the later action of the Supreme Court as well as of this court, and should be regarded as overruled.

For the reasons which I have indicated, I am constrained to dissent from the decision of the majority of the court.

LEWIS v. ALBERTSON ET AL.

[No. 2,702. Filed May 24, 1899. Rehearing denied Oct. 27, 1899.]

APPELLATE COURT.—*Transfer of Cause from Supreme Court.*—*Constitutional Question.*—*Waiver.*—Where an appeal from a judgment foreclosing street improvement assessments was taken to the Supreme Court, and no question was raised as to the constitutionality of the law under which the improvements and assessments were made, and the cause was transferred to the Appellate Court, such question will be deemed to have been waived. pp. 149, 150.

STREET IMPROVEMENTS.—*Foreclosure of Assessments.*—*Complaint.*—A complaint to foreclose street improvement assessments need not state whether the proceedings were had at a regular or special meeting of the city council. p. 150.

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STREET IMPROVEMENTS.—Foreclosure of Assessments.—Complaint.—Plans and Specifications.—It is not necessary to make the plans and specifications for the improvement of a street a part of the complaint in an action to foreclose an assessment. *p. 150.*

SAME.—Foreclosure of Assessment.—Complaint.—Title to Street.—A complaint to foreclose an assessment for street improvements need not allege that the city had title to the street. *pp. 150, 151.*

SAME.—Foreclosure of Assessments.—Complaint.—Contract.—In an action to foreclose an assessment for street improvements the assessment is the foundation of the action, and the contract for the improvements need not be made part of the complaint. *p. 151.*

SAME.—Time in which Work was Done.—Notice.—A reply in an action to foreclose street improvement assessments alleging that plaintiff entered upon the work of improving the street in a certain month and year, employing a large number of men and teams, and that defendant lived on the street improved, within plain view of the same, and of the work, sufficiently states the time when the work was done, and knowledge of defendant regarding the work. *pp. 152, 153.*

JUDGES.—Special Judge.—Appointment.—When Need Not Be in Writing.—When the person called to try the cause on change of venue is a duly qualified and elected judge of another circuit, a written appointment is not necessary. *pp. 153, 154.*

COURTS.—Adjourned Term.—Presumption as to Regularity.—It will be presumed in the absence of any showing to the contrary that the time for holding an adjourned term of court was properly fixed by the regular judge, and due notice given thereof. *p. 154.*

SAME.—Adjourned Term.—Special Judge.—Appointment.—Jurisdiction.—Waiver of Objections.—Where a special judge was appointed to try a cause at an adjourned term, and defendant appeared and filed demurrer, on separate days, and thereafter objected to the jurisdiction, solely upon the ground that the adjourned term was not regularly called, such action amounted to a waiver of any objection as to the regularity of appointment. *p. 154.*

SAME.—Special Judge.—Jurisdiction.—Objection.—Waiver.—An objection to the jurisdiction of the court is waived where the party in the same motion asked for a continuance. *p. 154.*

APPEAL AND ERROR.—Record.—A specification that the court erred in overruling appellant's motion for a new trial presents no question where the motion is not in the record. *p. 155.*

STREET IMPROVEMENTS.—Resolution.—A resolution for street improvements may embrace more than one street. *pp. 155, 156.*

APPEAL AND ERROR.—Assignment of Error.—Overruling Motion for Judgment.—An assignment of error that the court erred in overruling defendant's motion for judgment in her favor presents no question. *p. 157.*

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STREET IMPROVEMENTS.—Foreclosure of Assessment.—Complaint.—

In a complaint to foreclose street improvement assessments it is not necessary to set out in detail all of the proceedings of the common council relative to the improvement. *pp. 157-161.*

SAME.—Foreclosure of Assessments.—Complaint.—A complaint to foreclose street improvement assessments need not allege a previous demand. *pp. 158, 159.*

SAME.—Foreclosure of Assessments.—Complaint.—A complaint to foreclose street improvement assessments need not specifically allege that the assessments were due, where the allegations showed that the assessments were made, and the time for payment, as provided by statute, had passed. *p. 159.*

SAME.—Notice.—Notice of the time when property owners along the line of the proposed street improvement could make objections to the necessity of the construction thereof is unnecessary. *p. 159.*

PRACTICE.—Harmless Error.—The overruling of a demurrer to a pleading is not material where the facts necessary to a recovery are found in the special finding of facts. *p. 160.*

From the Lawrence Circuit Court. *Affirmed.*

John D. Alexander, James H. Willard, R. W. McBride and C. S. Denny, for appellant.

T. J. Brooks, W. F. Brooks, B. K. Elliott and W. F. Elliott, for appellees.

COMSTOCK, J.—Appellees instituted this action to foreclose a lien for improvement of H street in the city of Bedford. At the request of appellant the court made a special finding of facts and stated conclusions of law thereon. Upon such conclusions judgment was rendered in favor of appellees.

The cause was appealed to the Supreme Court. The able and elaborate brief of appellant filed in that court did not question the constitutionality of the law under which the improvements and assessments in question were made. The action being for the enforcement of a lien of purely statutory origin, and the amount not exceeding \$3,500, the Supreme Court, under the statute, transferred the cause to this court. In their reply brief, filed since such transfer, appellant discusses the constitutional question. Having failed to present the question in the only tribunal having jurisdiction,

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in the tribunal of her own selection, for the purpose of this appeal, it must be deemed to have been waived. As said by Rheinhard, J., speaking for the court in *Town of Andrews v. Sellers*, 11 Ind. App. 301, 303: "At all events, the order of transfer settles the question of jurisdiction in favor of this court."

We will pass upon the questions discussed of which this court has jurisdiction in the order in which they are presented. In her original brief appellant first discusses the second error assigned, viz., the overruling of appellant's motion to require appellees to make their complaint more specific. This motion set out seventeen specifications. We will consider those only that are discussed.

The second request asked that the complaint be made to state whether the various actions taken by the common council of the city of Bedford were had and taken at a regular or a special meeting of the council, and if at a special, what was the purpose of the meeting. Appellant cites no authority requiring such proceedings to have been had at a regular meeting.

The third (numbered fourth in appellant's brief) asked that the complaint state when the plans and specifications referred to therein were adopted, and to make a copy of them exhibits.

In *Dugger v. Hicks*, 11 Ind. App. 374, the court held that plans and specifications are no part of the cause of action.

The fifth request (numbered sixth in appellant's brief) asked that the complaint be made to show what title to the street, if any, the city of Bedford had at the time of the adoption of the resolution for the improvement (August 7, 1894), and, if it had title, to state the width of the street so owned. If there was a public street in the city of Bedford of the name designated in the resolution, its width and the title were not material in this action. *Dugger v. Hicks, supra*. Elliott on Roads and Streets, at page 380, says: "If * * * the local authorities were attempting to construct

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a road or street over property where they had, neither acquired nor could lawfully acquire the right to lay out a road or street," the property owner "might, if he moved in time and in an appropriate way, prevent the enforcement of the assessment against his property. But if he should delay until after the work had been done, he could not succeed."

The eighth and ninth requests ask that the complaint state the date at which the common council ordered the bids to be received, the date at which the contract mentioned in the complaint was entered into between the city and appellant, and the nature and terms of the contract, and what were the specifications of the same in full. The contract need not be made a part of the complaint; the assessment is the foundation of the action. *Dugger v. Hicks, supra*. The complaint shows that the contract was awarded to plaintiff on November 20, 1894, and that plaintiff has improved said street in all things complying with the resolution and order of improvement, and that on the 3rd of September, 1895, the improvement was accepted by the city engineer and the common council from the plaintiff, and the city engineer was ordered by said council to make and report a final estimate of the cost of said improvement, as by statute provided; that on the 10th of September, 1895, the engineer reported to the council a final estimate, which was filed, and referred to an appropriate committee, etc. When approved, this estimate became an assessment. *New Albany Gas, etc., Co. v. Crumbo*, 10 Ind. App. 360.

The sixteenth request (numbered seventeen in appellant's brief) asks that the contract and specifications be made a part of the complaint as an exhibit. In actions of this kind it is not necessary in the complaint to set out all the details of the work. *Dugger v. Hicks, supra*. The complaint alleges that the plans and specifications were on file in the office of the city engineer. Appellant had access to them. Appellant was not prejudiced by the rulings of the court on the motion to make more specific. Courts will require a com-

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plaint to be made more definite and certain when the precise nature of the charge is not apparent. The complaint is sufficiently certain and definite to make the charge apparent. *Alleman v. Wheeler*, 101 Ind. 141.

The sixth specification of error questions the action of the court in overruling the demurrer to the amended second paragraph of reply. The objection made to this paragraph is that it does not state the time of the beginning of the work nor any fact which shows knowledge on the part of the defendant (appellant) regarding it. It does not appear from the record that a demurrer was filed to this pleading. A demurrer was filed to the original second paragraph, but yet we think it sufficient to withstand a demurrer. It was pleaded as an estoppel. It states that the plaintiffs entered into the contract for the improvement of H street in the city of Bedford, as set out in the complaint; that all the proceedings "had been had and done" by the common council of said city as set out in said complaint. That under and by virtue of said contract "the plaintiffs entered upon said street and the work of improving the same according to their said contract, and under the direction, supervision, and control of the city civil engineer of said city, on the——day of March, 1895. That they employed a large number of teams, men, tools, implements, etc., continuously on said street until the 3rd day of September, 1895, when the same was completed, and was accepted by the city civil engineer and common council of said city. That in the improvement of said street, in labor, material, and other necessary expenses, they expended the sum of \$20,000. The defendant, during all the times named in said complaint, and all the times during which said proceedings were had and the work thereunder and under said contract was being done and performed, lived in the city of Bedford, on said street, within plain view of the same, and of the work aforesaid, saw the same was being done, had knowledge of the same, saw the said work and improvement going on, saw said expenditures being made, had

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full and complete knowledge of the same, made no objection whatever to said improvement, to said work, its order by the council, the beginning of the same, or its prosecution. Plaintiffs say that they have fully done and performed all the conditions of said contract with said city in good faith, believing that said proceedings were valid and regular, and knowing of no objection on the part of this defendant, or any other person to said proceedings, to said contract, or the improvement thereunder, or that the same were irregular. Wherefore plaintiffs demand judgment." This paragraph is certainly good so far as any objections are pointed out by appellant.

Appellant discusses the seventh and ninth specifications of errors together. The seventh challenges the action of the court in overruling appellant's objection to the jurisdiction of the court, and a motion for the continuance of the cause. The ninth challenges the action of the court in overruling her motion in arrest of judgment. In support of the seventh specification, appellant claims that Judge Hefron, before whom the cause was tried, had no authority to act, and that the adjourned term was illegal because called by a special judge. Appellant's original brief, in which these alleged errors are discussed, was written before the transcript was amended under the writ of *certiorari*. Some of the objections do not apply to the record as amended. The record shows that on the 30th day of November, 1896, Judge Martin (the regular judge) being disqualified, appointed S. B. Voyles, judge of the forty-second judicial circuit of Indiana, special judge to try this cause. On December 7, 1896, Judge Hefron of the forty-ninth judicial circuit was appointed to try it, the record of appointment being signed by Judge Martin and Judge Voyles. An adjourned term was thereafter ordered, beginning December 21, 1896, during which the trial of said cause was to be held by said Hefron, Judge as aforesaid, and the clerk of the court was ordered and did give notice of the holding of the adjourned term by publication one week each in a daily and weekly newspaper

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of general circulation printed in said county of Lawrence, signed by William H. Martin, Judge. It thus appears that the adjourned term was called by the regular judge; that the record of appointment of Judge Hefron and the order for the adjourned term were signed by the regular judge. It is objected that there is no written appointment shown for either Judge Voyles or Judge Hefron. The amended transcript shows the appointment of Judge Voyles on the 30th of November, 1896; that on the 7th of December, 1896, the cause was set for trial before Judge Hefron in an order signed by Judge Martin and Judge Voyles. So, in addition, the record shows that Judges Voyles and Hefron were judges of other circuit courts of Indiana. A written appointment is not necessary when the person called to try the cause upon change of venue is a duly qualified and elected judge of another circuit. *Wood v. Franklin*, 97 Ind. 117; §419 Burns 1894.

As heretofore stated, the record shows that the time for holding the adjourned term was properly fixed by the regular judge, and due notice given, facts which would be presumed in the absence of a showing to the contrary. *Wood v. Franklin*, 97 Ind. 117; §1443 Burns 1894; *State v. McGuire*, 53 Iowa 165, 4 N. W. 386; *State v. Sachs*, 3 Wash. 496, 29 Pac. 446; 1 Elliott's Gen. Prac. §227. But if the objections to the appointment of Judge Hefron were valid, we think they were waived. All objections to a special judge must be made seasonably and promptly. Appellant appeared and filed demurrers on separate days, and thereafter objected to the jurisdiction solely upon the ground that the adjourned term was not regularly called. This was a waiver of any objection as to the regularity of the appointment. In the same motion they asked for a continuance. This was a waiver of the objection to the jurisdiction. *Sargent v. Flaid*, 90 Ind. 501; *Bucklin v. Strickler*, 32 Neb. 602, 49 N. W. 371; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; *Landon v. Comet*, 62 Mich. 80, 28 N. W. 788; 2 Elliott's Gen. Prac. 474; *Lillie v. Trentman*, 130 Ind. 16, 20; and authorities there cited.

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The eighth specification of errors stated that the court erred in overruling appellant's motion for a new trial. It presents no question, for the motion is not in the record.

The tenth specification is that "the court erred in its conclusions of law on the facts found." Upon this alleged error appellant states that "the special findings taken together" show that the improvement was a double one, of two streets, not a single one, or of one street, as the statute contemplates." The special findings show that the common council, on the 3rd day of July, 1894, by more than a two-thirds vote, adopted a resolution declaring that it was necessary to improve H street in said city from the south line of 15th street south to the corporation line; also to improve I street; that notice of the passage of said resolution and notice to property owners that objection to such improvement would be heard was duly given; that on the 7th of August, 1894, a resolution was duly adopted ordering that H street in said city be improved from the south line of 15th street south to the corporation line, and that I street be improved from the south line of 16th street south to the corporation line, both streets to be improved by grading, macadamizing, guttering and laying sidewalks, in accordance with the general plans and specifications theretofore adopted, and then on file in the office of the city civil engineer, and to be done at the cost and expense of the lots and parts of lots and lands abutting on the improvement on said street, in proportion to the number of lineal feet fronting on said improvements, except cost of streets and alley intersections. We see no reason, and none is stated by appellant, why one resolution may not provide for the improvement of two streets. *Adams Co. v. City of Quincy*, 130 Ill. 566, 22 N. E. 624; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105; *Mayor v. Weed*, 96 Ga. 670, 23 S. E. 900; *Kirkland v. Board, etc.*, 142 Ind. 123.

In the case of *Mayor v. Weed*, *supra*, it is said: "The power conferred by this act is legally exercised, whether

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separate ordinances be passed for each street intended to be improved, or whether the improvement of several streets be provided for in one ordinance. The passage of the ordinance is simply the evidence that, according to the discretion vested in the mayor and aldermen, the improvement of the street or streets covered thereby is necessary to the welfare of the city, and we know of no reason why this declaration may not as well be made by a single ordinance to cover a number of streets, the improvement of which in the judgment of the city council is necessary, as it could be made to cover only a single street. The power to pass an ordinance for the improvement of any of the streets of the city includes the power to improve any number of the streets. We think, therefore, that the objection to the ordinance, upon the ground that it contemplated the improvement of more than a single street and was consequently illegal and contrary to the charter power, is without merit." The contract for H street was let, and the assessments for H street were made separately for that street. The work in such case may be let on separate contracts even where the improvement is of a single street. *Eyerman v. Blakesley*, 13 Mo. App. 407; *Kemper v. King*, 11 Mo. App. 116.

In this connection appellant states that there is no finding of estoppel. If the proceedings were valid, the assessment was properly enforced whether there was an estoppel or not. It is found, however, that the defendant Helen N. Lewis lived on said H street in the city of Bedford, and had full knowledge of the prosecution of said work from its commencement to its completion. It is found that the contractor began the work "on the 1st day of April, 1895. and completed the same about the 20th day of August, 1895." The facts thus found we think sufficient to estop appellant from attacking collaterally the regularity of the proceedings. *Board, etc., v. Plotner*, 149 Ind. 116; *New Albany Gas, etc., Co. v. Crumbo*, 10 Ind. App. 360; *Ross v. Stackhouse*, 114 Ind. 200, 205.

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The eleventh specification of the assignment of errors, that the court erred in overruling defendant's motion for judgment in her favor, presents no question. *Smith v. Davidson*, 45 Ind. 396; *Peden, Adm., v. King*, 30 Ind. 181.

It is claimed also that the findings of facts (numbers eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three) show conclusively that the city never acquired title to all of H street. It appears from the special findings that H street was a public street of said city, and that appellant's property abutted upon the part improved. The portion of the street referred to was a strip of ground about thirty-two feet wide extending along H street; it is not contended that appellant's property abutted on this strip. It had been used as a public street since 1890. If the city did not own the fee, it still might improve the street. Appellant's property abutted on the portion improved; and if another part of the street was improved to which the city did not own the fee, appellant would have no right to complain. To defeat the improvement it would be necessary to show that the title could not be acquired. *Elliott's Roads and Streets*, 380; *Jackson v. Smith*, 120 Ind. 520.

The twelfth specification is that the record of the judgment is not, as appears from the record, signed by the judge trying the cause and rendering the judgment. This specification is not well taken for the reason that the return to the *certiorari* shows that Judge Hefron tried the cause and signed the judgment.

In the foregoing rulings complained of we find no error for which the judgment of the trial court should be reversed. It remains only to consider the third specification of error which challenges the sufficiency of the complaint. It is objected first, that it does not show the adoption of a resolution declaring the necessity for the proposed improvement, and stating the kind, size, and location, and designating points terminal as required by §4289 Burns 1894. Said section reads as follows: "Whenever cities or incorporated

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towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town if there be any, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

After averring that the council adopted a resolution ordering that H street be improved from the south line of 15th street to the south corporate limits of said city by grading, macadamizing, and guttering the street, and laying off sidewalks thereon, according to the plans and specifications theretofore adopted, the complaint avers that on the 3rd day of July, 1894, the common council had declared the necessity of making such improvement. It does not appear that the resolution contained more than the declaration of necessity. The character of the improvement was sufficiently stated. The assessment and not the resolution was the foundation of this action. The resolution was not, therefore, necessarily a part of the complaint. "The issue to be tried was" as said by our Supreme Court in *Ross v. Stackhouse*, 114 Ind. 205, (an action to enforce a lien for street improvements) "whether or not, in ordering the work and letting the contract, the common council proceeded under color of the statute, whether the work has been done in whole or in part according to the contract, and whether an estimate has been duly made of the work." The decisions in cases of this character have not held that all the detail of the actions of

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the common council should be set out in the complaint. Second, that it does not show any sum due, and does not allege a demand. A demand is not necessary. *Myers v. Indianapolis Union R. Co.*, 12 Ind. App. 170; *Sloan v. Faurot*, 11 Ind. App. 689. The complaint does not in terms allege that the assessment was due, but the statute fixes the time when assessments are due. The allegations showed the assessment made, and that the time for payment had passed, and appellant had refused to pay them. Third, because it does not show that any notice of the passage of any such resolution was given as required by said section. Fourth, because the only notice which the complaint shows was given was a notice of the intention to make certain improvement, instead of the passage of the resolution of necessity as required by law. Fifth, because it does not show that any notice was given of time when property owners along the line of the proposed improvement could make objection to the necessity for the construction thereof. Such notice has been held to be unnecessary. *Barber Asphalt Co. v. Edgerton*, 125 Ind. 455, 464; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 35; *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261. See, also, *Hughes v. Parker*, 148 Ind. 692. Sixth, because the complaint does not show the making of the report by the city civil engineer which furnished the necessary data for the assessment, as required by §4293 Burns 1894. The complaint alleges that, after the completion of the work and its acceptance by the city civil engineer and the common council, the engineer was ordered to make and report a final estimate of the cost of said improvement as by statute provided; that on the 10th of September the engineer reported his final estimate; that it was by the common council referred to an appropriate committee for consideration, and the council gave notice for two weeks by publication in the Bedford Mail, a newspaper of general circulation published in said city, that hearing would be had on said estimate before said committee on the 28th of September, 1895, at the council chamber. On

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said day said committee met and considered said estimate, and reported to the common council approving the adoption of the same; that on the 1st of October, 1895, the council approved and adopted said estimate, and ordered that it be an assessment against lots and parts of lots bounding on said improved part of said street, and that said assessment be for the use and benefit of plaintiff. A copy of said estimate and assessment is made a part of the complaint as Exhibit A. This exhibit, which is to be read as a part of the complaint, sets out the facts touching said improvement required by said §4293 Burns 1894. By the statute, the civil engineer, when the work is completed, is required to make a final estimate of the total cost thereof, * * * to report to the common council the following facts touching said report, the average cost per running foot, etc. This report, when the estimate is approved, becomes the assessment. Notice was given that the assessment would be ordered, as stated. That which is called estimate in the complaint contained the facts which were required to be in the report. The council gave notice that a hearing would be had on said estimate. The estimate gave the information the report would have given. The appellation given this work of the civil engineer, the use of the word "estimate" instead of "report," when the estimate contained the facts required in the report cannot be considered serious error. Besides, it has been held by the Supreme and this Court that, when there is a special finding of facts, the overruling of a demurrer to pleadings is not material, where the facts necessary to a recovery are found. *Woodward v. Mitchell*, 140 Ind. 406; *Pape v. Randall*, 18 Ind. App. 53.

The special findings, among other facts, show that the common council adopted general plans and specifications for the improvement of streets, alleys, and walks, in accordance with which all improvements should thereafter be made, decided that the improvement was necessary, adopted a resolution ordering it to be made, gave notice by proper publi-

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cation "of the passage of such resolution, * * * the necessity for the improvement," and notifying the property owners that objection to such improvement would be heard at a designated time and place in said city; that no person appeared to make objections to such improvement. "Unless, therefore, the law under which the assessment is imposed makes no provision for notice, or unless the proceedings under which the proposed improvement is to be made are totally void for want of the observance of some condition necessary to the attaching of jurisdiction, the work can not be arrested at any stage; and in any event, one who acquiesces, with knowledge, until after the improvement has been completed, cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the contractor proceeded in good faith and without notice from the property owner. He can not enjoy the benefits and escape the burden, unless he interferes or gives notice before the benefit is received." *Ross v. Stackhouse*, 114 Ind. 200.

It is stated in appellee's brief that the complaint under consideration is modeled on the complaint in *Van Sickle v. Belknap*, 129 Ind. 558. An examination of the complaint in that case as set out in the opinion supports the statement. It is a suit to enforce a lien for a street improvement. The complaint before us contains all the averments and others set out in the case referred to, except that of demand. The court, by Elliott, J., said: "It is our judgment that the complaint states facts entitling the appellee to a lien. It shows compliance with all of the material statutory requirements, and this is sufficient. It is never proper to plead evidence for only facts are to be averred." The court properly overruled the demurrer to the complaint.

The material jurisdictional facts are substantially averred in the complaint and found in the special findings. Judgment affirmed.

Willard v. Albertson.

WILLARD ET AL. v. ALBERTSON ET AL.

[No. 2,720. Filed May 24, 1899. Rehearing denied Oct. 27, 1899.]

PLEADING.—Mistake.—Words and Phrases.—In an action by a contractor to foreclose a street improvement assessment, an allegation in a reply that plaintiff "did not enter into the contract" is corrected by the pleading itself, which avers that he began the improvement on a certain day according to his said contract. *pp. 162, 163.*

STREET IMPROVEMENTS.—Foreclosure of Assessments.—Pleading.—Estoppel.—A reply by a contractor in an action to foreclose an assessment for street improvements, alleging that all of the proceedings were had by the common council, and all notices given as set out in the complaint, that he performed the work under the direction of the city civil engineer; that he employed a large number of men and expended a large sum of money in making the improvements, and that defendant resided in the city and street in which the improvements were made, and saw the work going on and made no objection, states facts sufficient to constitute an estoppel, although the reply referred to certain exhibits as being filed with the answer which were not filed. *pp. 162, 163.*

APPEAL AND ERROR.—Record.—A specification of error based upon the action of the court in overruling a motion for a new trial presents no question, where the motion is not in the record. *p. 163.*

From the Lawrence Circuit Court. *Affirmed.*

John D. Alexander, James H. Willard, R. W. McBride and C. S. Denny, for appellants.

T. J. Brooks, W. F. Brooks, B. K. Elliott and W. F. Elliott, for appellees.

COMSTOCK, J.—In this cause there are several specifications of error not assigned and not passed upon in *Lewis v. Albertson, ante, 147.*

The first discussed is the overruling of the demurrer to the second paragraph of reply. This paragraph was pleaded as an estoppel. The reply avers that plaintiff did not enter into the contract for the street improvement, but in view of the whole pleading, which avers that he began the improve-

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ment on the ——day of April, 1895, according to his said contract, the error in the use of the word “not” is so obvious that it corrects itself. Appellants claim that the paragraph is bad because it is a reply to the fifth paragraph of answer and refers to Exhibits C and D as being filed with that paragraph of answer, when, in fact, no such exhibits were filed. Said paragraph sets out facts sufficient to constitute an estoppel without the erroneous reference to the exhibits. It avers that all the proceedings had been had by the common council and all notices given as set out in the complaint; that he performed the work under the direction of the city civil engineer of said city; that he employed a large number of men, teams, and tools; that he completed the same, and that it was accepted by the city civil engineer and the common council; that he expended \$20,000 in said work; that the defendants resided in the city of Bedford, on said street, in plain view of the improvements, and saw the work going on; had full knowledge of the same, and made no objection to said work nor the order of the common council, the beginning of the same, nor its prosecution; that plaintiff took the contract in good faith and completed the work, relying upon the legality of the same, and knowing of no objection of said parties, following the direction of the city civil engineer according to the specifications. These averments were sufficient. Elliott on Roads and Streets, pp. 419, 420, 421, 422, 423, 386, 387, 388. Watson on Liens, §1233; *Ross v. Stackhouse*, 114 Ind. 200; *Clements v. Lee*, 114 Ind. 397; *Prezinger v. Harness*, 114 Ind. 491; *New Albany Gas, etc., Co. v. Crumbo*, 10 Ind. App. 360; *Depuy v. City of Wabash*, 133 Ind. 336; *Cluggish v. Koons*, 15 Ind. App. 599; *Western Paving, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 525, 10 L. R. A. 770.

The eighth specification of error is the overruling of appellants' motion for a new trial. This motion does not appear in the record. The other questions discussed are decided in *Lewis v. Albertson*, ante, 147, and upon the authority of that decision the judgment is affirmed.

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PER CURIAM.—It having been suggested that Mrs. Kate N. Willard, one of the appellants, has died since the submission of this cause, it is ordered that the judgment rendered herein be as of the term when the submission was made.

WILLARD ET AL. v. ALBERTSON ET AL.

[No. 2,785. Filed May 24, 1899. Rehearing denied Oct. '97, 1899.]

STREET IMPROVEMENTS.—*Declaratory Resolution.*—*Jurisdiction.*—It is not necessary to pass a resolution declaring the necessity of a street improvement in order to give the common council jurisdiction. p. 165.

SAME.—*Cities.*—*Legality of Incorporation.*—The legality of the incorporation of a city cannot be raised in an action to foreclose assessments for street improvements. p. 165.

SAME.—*Ordinance for Improvement of Two Streets.*—*Assessments.*—Where an ordinance was passed for the improvement of two streets and only one was improved, the costs thereof cannot be assessed on both streets. p. 165.

SAME.—*Pleading.*—*Fraud.*—*Due Process of Law.*—An answer to a complaint in an action to foreclose assessments for street improvements charging fraud and want of due process of law must state facts from which the court can determine the existence of fraud or the want of due process of law. p. 165.

APPELLATE COURT.—*Constitutional Law.*—The Appellate Court has no jurisdiction of constitutional questions. p. 165.

From the Lawrence Circuit Court. *Affirmed.*

John D. Alexander, James H. Willard, R. W. McBride and C. S. Denny, for appellants.

T. J. Brooks, W. F. Brooks, B. K. Elliott and W. F. Elliott, for appellees.

COMSTOCK, J.—The questions discussed in this appeal are passed upon in *Lewis v. Albertson, ante*, 147, with the exception of the action of the court in sustaining demurrers to the second, fifth, seventh, and eleventh paragraphs of answer. This specification of error is in the following lan-

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guage: "Third. That the court erred in sustaining plaintiffs' demurrers to the second, fifth, seventh, and eleventh paragraphs of defendants' Willard & Willard's answer."

Appellants claim that the second paragraph of answer sets up matters, which if true, show the original resolution of necessity was void, but do not state in what particular or particulars it was void. Such resolution and notice, however, are not essential to the giving of jurisdiction to the common council. *Hughes v. Parker*, 148 Ind. 692; *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261.

The fifth paragraph of answer avers that the resolution for the improvement of I street was void for the reason that the city of Bedford was never a legally incorporated municipality. This raises a constitutional question. The legality of the incorporation can not be attacked thus collaterally. *Mullikin v. City of Bloomington*, 72 Ind. 161.

The seventh paragraph is to the effect that the council passed an ordinance to improve H and I streets, improved I street and assessed the cost on I street alone, when it should have been assessed on both streets. This proposition can not be sustained. It is answered in *Lewis v. Albertson, supra*, and *City of Connersville v. Merrill*, 14 Ind. App. 303. The eleventh paragraph of answer avers that the assessment against the lots and parcels of ground in the complaint described is in excess of their assessed value for taxation; that the assessment is without due process of law, and is in violation of the bill of rights under the Constitution of the State of Indiana and of the United States, and is fraudulent and corrupt and for the purpose of confiscating the lands in question. So far as this paragraph attempts to plead fraud and want of due process of law, it is defective for not averring facts from which the court could determine the existence of fraud, or the want of due process of law. Of the constitutional question, this court has no jurisdiction. Upon the other questions discussed the judgment is affirmed

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upon the authority of *Lewis v. Albertson, supra*. Judgment affirmed.

PER CURIAM.—It having been suggested that Mrs. Kate N. Willard, one of the appellants, has died since the submission of this cause, it is ordered that the judgment rendered herein be as of the term when the submission was made.

WILLARD ET AL. v. ALBERTSON ET AL.

[No. 2,786. Filed May 24, 1899. Rehearing denied October 27, 1899.]

STREET IMPROVEMENTS.—*Cities*.—*Legality of Incorporation*.—The legality of the incorporation of the city cannot be attacked in an action to foreclose assessments for street improvements. p. 166.

APPELLATE COURT.—*Transfer of Cause*.—*Questions Decided by Supreme Court*.—Questions which have been decided by the Supreme Court cannot be presented to the Appellate Court when the cause is transferred to such court. p. 167.

PRACTICE.—*Motions*.—*New Trial*.—*Arrest of Judgment*.—A motion for a new trial cannot be made after filing a motion in arrest of judgment. p. 167.

From the Lawrence Circuit Court. *Affirmed*.

J. D. Alexander, J. H. Willard, R. W. McBride and C. S. Denny, for appellants.

T. J. Brooks, W. F. Brooks, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellees.

COMSTOCK, J.—There are questions raised by this appeal not passed upon in *Lewis v. Albertson, ante*, 147. The first is that the court erred in sustaining the demurrer to the fifth paragraph of answer. This paragraph denies that the city of Bedford was duly incorporated and that therefore the proceedings of the council in question were void. The legality of the incorporation can not be attacked thus collaterally. *Mullikin v. City of Bloomington*, 72 Ind. 161.

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The fifth specification challenges the action of the court in sustaining the demurrer to the amended thirteenth paragraph of answer. This paragraph is an answer to so much of the complaint as demands attorney fees, upon the ground that the provision for attorney fees by the act of March 8, 1899, and acts amendatory and supplemental thereto, are unconstitutional. Appellants admit that the Supreme Court has decided the question against them, but they desire to present it again. It can not be done in this tribunal.

The next error claimed is the sixth, the overruling of the demurrer to the amended second paragraph of reply. The demurrer is not in the record, but we are of the opinion that this paragraph by way of estoppel was sufficient.

As to the action of the court in overruling the motion for a new trial, which is also assigned as error, it is only necessary to say that before the filing of that motion, appellants filed their motion in arrest of judgment. The motion for a new trial therefore came too late. *Cincinnati, etc., R. Co. v. Case*, 122 Ind. 310. In the rulings herein referred to, we find no error. As to the other alleged errors, the judgment is affirmed upon the authority of *Lewis v. Albertson*, *supra*. Judgment affirmed.

PER CURIAM.—It having been suggested that Mrs. Kate N. Willard, one of the appellants, has died since the submission of this cause, it is ordered that the judgment rendered herein be as of the term when the submission was made.

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[No. 2,861. Filed October 31, 1899.]

EVIDENCE.—Weight.—Appeal and Error.—A judgment will not be reversed on the weight of the evidence, where there is evidence fairly tending to support it. *p. 171.*

BILLS AND NOTES.—Negotiable Instruments.—Bona Fide Purchaser.—Instructions.—An instruction in an action on a promissory note that if the note is negotiable, and plaintiffs are the owners thereof, and took it before maturity, in the usual course of business, without

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notice of any facts impeaching its validity between the original parties, then the plaintiffs hold same by a good title, free from all defenses that might have been made by defendant in the hands of the original owner, is not bad for failure to state that plaintiffs must appear to be *bona fide* purchasers acting in good faith. pp. 171-173.

BILLS AND NOTES.—Negotiable Instruments.—Bona Fide Purchaser.

—*Instruction.*—An objection to an instruction in an action on a promissory note, by an indorsee, because it uses the expression "without knowledge of defenses" instead of without knowledge of the facts which constituted the defense, is not well taken. p. 172.

SAME.—Bona Fide Purchaser.—Consideration.—One who takes a negotiable note on an antecedent debt, or as collateral security, is protected in the same manner as a purchaser for a new consideration. pp. 172, 173.

EVIDENCE.—Admissions.—Attorney's Fees.—Bills and Notes.—Instruction.—An instruction in an action on a promissory note, fixing the amount for which the verdict should be returned and including in the amount attorney's fees, was erroneous, where plaintiff offered to prove the attorney's fees, and defendant stated that "the usual attorney's fee under the rule is admitted by defendant," and no further reference was made to the subject. p. 174.

SAME.—Rebuttal.—No error was committed in permitting articles of association, duly signed and acknowledged, but not recorded in the county, as required by law, to be admitted in evidence for the purpose of rebutting the charge of bad faith in failing to incorporate the company. pp. 174, 175.

From the Vanderburgh Superior Court. *Affirmed.*

C. L. Wedding and *W. M. Blakey*, for appellant.

Philip W. Frey, for appellees.

COMSTOCK, C. J.—Appellees (plaintiffs below) sued appellant upon a promissory note, alleging in the complaint that they were partners, doing business under the firm name of Syfers, McBride & Co., and that appellant on the 1st of July, 1892, executed his promissory note payable at the Bank of Commerce of Evansville, Indiana, promising to pay to the order of himself, six months after date, the sum of \$500; that on the same day said Warren indorsed and delivered said note to A. H. Mattox and F. G. Cross; that thereafter, before its maturity, for value, Mattox and Cross, by indorsement and delivery, transferred and sold the note to appellees, who are now the owners thereof. A copy of the

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note and indorsements was made by exhibit a part of the complaint. Appellant answered in four paragraphs: First, that the note was given without consideration, and that appellees took it with the knowledge that it was so given; second, it was given without consideration, and that there were facts and circumstances attending the transfer, and known to plaintiffs at the time, sufficient to put them on their guard and inquiry into the consideration. The third paragraph alleges, in substance, that prior to the execution of the note in suit appellees were the owners of the right to use and vend the "Keeley cure" in the State of Indiana, and that they transferred the right to A. H. Mattox and F. G. Cross, payees in said note, upon contracts for future payments, to be made as they should be able to make the same out of the incorporation and formation of institutes with the right to use said cure; that they selected Evansville as a point at which to establish an institute, and proceeded to procure names for the formation and incorporation of the institute for that purpose; that they falsely represented the value of the institution and the profits of the same; that they falsely represented that the institute had been incorporated, and that the certificates of stock had been made out and were ready for delivery, and requested the signing of the note upon the condition that they should hold and retain the stock as security for their payment, and that when the note should be paid then the certificate would be given to defendant. It further alleges that such institute was never incorporated; that these representations were made to induce defendant to sign the note and to defraud him; that all these facts were known to plaintiffs before the transfer of the notes to them. The fourth paragraph, in addition to the fraudulent acts and representations charged in the third paragraph in the procuring of the note, alleges that said Mattox and Cross were the agents of appellees, with whom they conspired to cheat and defraud defendant and others. Appellees replied to these paragraphs (1) by general denial; (2)

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that the note sued on was bought by them for value before maturity, and without notice of any defense or equity existing against the same in favor of appellant, and was transferred to appellees in the usual course of commercial business, and that they were the owners by purchase and assignment, for value, without notice, before maturity. Subsequently appellant filed a fifth paragraph of answer to the effect that plaintiffs were not the real parties in interest; that the note was, at the commencement of the action, and at all times since had been, the property of the Keeley Cure Institute of Indiana, a corporation organized under the laws of the State of Indiana. For reply to this paragraph of answer plaintiffs alleged that they had succeeded the corporation referred to in its rights and liabilities, and had become the owners and entitled to the possession of all property formerly owned by said corporation, and that they were at the time of bringing of the action, and still are, the sole joint owners of the note. The trial resulted in a verdict and judgment in favor of appellees for \$711.61. The action of the court in overruling appellant's motion for a new trial is the only error assigned.

It appears from the evidence that in November, 1892, the Keeley Institute of Indiana, composed of Rufus H. Syfers, Frank A. McBride, and George C. Webster, of Indiana, having the sole and exclusive right to establish and manage Keeley Institutes for the treatment of and cure of the drink, opium, and other drug habits, and to sell and administer Keeley remedies used for such purposes in the State of Indiana, derived from the Lester E. Keeley Co., of Dwight, Illinois, by written bill of sale, sold to A. H. Mattox and F. G. Cross, of Cincinnati, Ohio, all said exclusive rights, and all interests in all Keeley Institutes theretofore organized in Indiana. The consideration for said sale was \$36,250. They paid \$7,500 on the day of sale, and executed their notes for the balance as follows: \$2,500 due sixty days; \$5,000 due four months; \$5,000 due seven months; \$5,000 due ten months; \$5,000 due thirteen months; \$6,250 due fifteen months.

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It was a part of the contract of sale that all cash and good bankable notes accruing from the sale of institute rights to establish Keeley Institutes in the State of Indiana should be paid by Mattox and Cross to Syfers, McBride, and Webster, and be credited on the notes and indebtedness of said Mattox and Cross. Institutes were established in several places in Indiana, one at Evansville. Stock was subscribed for, among other residents of that city, by appellant, for which he executed the note in suit. This note was made by appellant, payable at the Bank of Commerce of Evansville, six months after date, to the order of himself, and indorsed by him and delivered to Mattox and Cross, who indorsed it to appellees before its maturity. It was credited to Mattox and Cross upon one of the notes held by appellees.

The first reason set out in the motion for a new trial, viz., that the verdict of the jury is contrary to the law, and not sustained by the evidence, is first discussed in appellant's brief. It is insisted that the verdict is contrary to law, and not sustained by the evidence, for the reason that the note in suit was the property of the Keeley Institute, a corporation of Indiana; that the suit was not brought by the real parties in interest. The second paragraph of appellees' reply to the fifth paragraph of answer avers that they had succeeded the corporation referred to in its rights and liabilities, and that they were at the time of the bringing of this suit, and still are, the joint owners of the note. An examination of the record discloses that there was evidence fairly tending to support this paragraph, as well as all the material facts necessary for a recovery, and under the well settled rule of practice of appellate tribunals in this State, this is sufficient to uphold the judgment.

Appellant objects to the second instruction given to the jury "because it fails to state the important rule of law that the plaintiffs must appear to be *bona fide* purchasers, acting in good faith." The same objection is made to the third instruction. The two instructions in question are as follows:

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(2.) "The court instructs the jury that if you find from all the evidence that the plaintiffs are the owners of the note described in the complaint, that the same is a negotiable note, and that the plaintiffs took it before maturity, in the usual course of business, without notice of facts which impeached its validity between the original parties to the note, or of such facts as should have put them upon inquiry, then the plaintiffs hold the same by a good title free from all defenses that might have been made by the defendant if it had been sued on by Mattox and Cross. And the court further instructs the jury that unless there are circumstances which excite suspicion, the purchaser is not bound to make inquiry at the time of purchase." (3.) "Inland bills of exchange and promissory notes payable in a bank in this State are governed by what is called the law merchant, that is to say, as applicable to the issues raised in this cause, if you believe from all the evidence in the case that the plaintiffs in the usual course of business purchased from Mattox & Cross the note sued on for a valuable consideration, before the maturity of said note, without any notice of any defense or equity existing against the same, and that at the time of their purchase they had no knowledge of such facts as put them upon inquiry, then they are entitled to recover, even though as between the defendant and the original payees of the note there existed equities in favor of the defendant." They are not open to the objections stated.

The fourth instruction is objected to because it uses the expression "without knowledge of defenses" instead of "without knowledge of facts" which constituted the defense. The following extracts from this instruction "without knowledge of any defense existing against the same and without knowledge of such facts as put them upon inquiry and in the usual course of business," shows the objection not to be well taken.

The objection to the sixth instruction is that it ignores the question as to whether appellees acted in good faith in the transaction. It is further objected that this instruction

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states the law to be that, one who takes a promissory note upon an antecedent debt or as collateral security is protected as one who buys a note for a new consideration, and appellant insists that one who takes a negotiable note upon an antecedent debt is not a *bona fide* holder for value and entitled to none of the rights of such holder. Appellant cites *Petry v. Ambrosher*, 100 Ind. 510. The court held in that case that a wife who secures a conveyance of land from her husband in payment of an antecedent debt, and does not change her condition on account of the conveyance, is not a *bona fide* purchaser for a valuable consideration in such a sense as to be entitled to defeat the vendor's lien of her husband's grantor for the purchase money of the land; the court stating that the vendor's was the stronger equity, and prior in point of time; that it would be gross injustice to permit a man to get another's land without paying for it, and after having gotten it, turn it over to his wife in payment of a precedent debt. The instruction is in the following language: "The court instructs the jury that if you believe from all the evidence given in the case that the plaintiffs in this action bought this note in the usual course of business, before its maturity, from Mattox and Cross, and that at the time they purchased the same they had no knowledge of such facts as put them on inquiry, and that they gave or parted with a valuable consideration for said note, then the plaintiffs are entitled to recover the amount of said note with interest thereon according to its tenor, and reasonable attorney's fees." It correctly states the law. *Straughan v. Fairchild*, 80 Ind. 598; *Spencer v. Sloan*, 108 Ind. 183, 188; *National Exchange Bank v. Berry*, 21 Ind. App. 261. No authority is cited to sustain appellant's objection to either of the instructions but *Petry v. Ambrosher*, *supra*, which is not applicable to the facts in the case at bar.

Without unduly extending this opinion by reciting the objections to each of the other instructions excepted to, we deem it sufficient to say that, considered together, the instruc-

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tions fairly state the law, except the following, being number one of the instructions given by the court of its own motion: "Unless the defendant has established by a fair preponderance of the evidence one or more of the defenses set out in his answer, the plaintiffs are entitled to recover upon the note set out in the complaint. Unless the defendant has thus established one or more of the defenses aforesaid, there is now due on the note for principal, interest and attorney's fees the sum of \$711.61." We think in this instruction the court erred in fixing the amount for which the verdict should be returned, and in including in that amount an attorney's fee. It is evident that the jury included in the sum awarded appellees more than the principal and interest due on the note; while the note provided for attorney's fees, there was no evidence fixing the value of the fee. Counsel for appellees offered, after the introduction of the note in evidence, to prove a reasonable attorney's fee, and counsel for appellant stated "The usual attorney's fee under the rule is admitted by the defendant." No further reference was made to the subject.

It is claimed that the court erred to the prejudice of appellant in repeatedly instructing the jury, in substance, that "if a bankable note was given, and it passed into the hands of appellees, that they must find for plaintiffs." As said by Robinson, J., speaking for the court in *Mullen v. Bower*, 22 Ind. App., 294: "It is, no doubt, the correct practice that, when a court has once stated to the jury a legal proposition clearly and fully, it should not repeat it."

The law governing the transfer of commercial paper, for value, before maturity, to an innocent purchaser has been expressed in various forms in the instructions given to the jury with the evident purpose of assisting them in the application of the evidence, but we can not say that this was done to the prejudice of either party to the suit in the case before us.

The last reason in the motion for a new trial discussed

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by appellant's counsel is that the court erred in allowing appellees to put in evidence articles of association of the Keeley Institute of Evansville, Indiana. These articles were signed and acknowledged before a notary public. Their introduction in evidence was objected to because they had never been recorded in the recorder's office of Vanderburgh county, as required by statute. Counsel for appellees, in offering this evidence, stated that appellant had sworn that no corporation had been organized, to make the impression that the failure to organize was the fault of Mattox and Cross; that they offered the evidence to show that it was not the fault of the parties in Evansville having the matter in charge. They claimed that it was admissible to rebut the charge of bad faith. We think it was competent for that purpose.

The judgment of the court is affirmed, upon the condition that appellees within thirty days remit the difference between the principal and interest of the note in suit and the amount of the judgment; otherwise, the trial court is directed to sustain appellant's motion for a new trial.

HUNTINGTON COUNTY LOAN AND SAVINGS ASSOCIATION
v. EMERICK.

[No. 2,894. Filed Oct. 31, 1899.]

BUILDING AND LOAN ASSOCIATIONS.—Withdrawal.—Complaint.—Section 8410 Horner 1897 provides that no stock shall be withdrawn from a building and loan association which is held in pledge for security or subject to a lien for the payment of unpaid instalments and other charges incurred thereon, and that not more than one-half of the funds in the treasury shall be applicable to demands of withdrawing stockholders, unless the board of directors in its discretion shall order otherwise. *Held*, that the complaint, in an action by a member for the withdrawal of his stock need not allege that the stock was not held in pledge for security, or subject to liens for the payment of unpaid instalments or other charges, and that there were funds in the treasury with which to pay the amount due on the withdrawal of his stock. *pp. 176-184.*

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BUILDING AND LOAN ASSOCIATIONS.—Withdrawal.—Notice.—Notice to the secretary of a building and loan association of intention to withdraw stock from such association is insufficient, within the meaning of §3410 Horner 1897, which provides that “any stockholder wishing to withdraw from such corporation may do so upon three months’ notice given to the board of directors.” pp. 184-187.

From the Huntington Circuit Court. *Reversed.*

J. B. Kenner and U. S. Lesh, for appellant.

J. M. Hatfield, for appellee.

WILEY, J.—Appellee was plaintiff below, and by his complaint it appears that he subscribed for five shares of the capital stock of appellant association, which shares were \$100 each; that the dues upon such stock were \$3.50 per month; that he paid all of his dues each month, beginning such payments in September, 1891, and continued to and including the month of April, 1894; that he paid in all for dues on said stock \$112; that when he made his last payment in April, 1894, he notified the board of directors of appellant association that he wished to withdraw therefrom, and asked that he receive the amount paid in on his stock, less all fines and other charges thereon, with six per cent. interest; that he has “waited more than three months, but that no part of said money has been paid or tendered to him by the officers of said corporation.” A demurrer for want of facts was overruled, and appellant excepted. Appellant answered in two paragraphs; (1) a general denial, and (2) that by the by-laws of the association, which is the contract between appellant and appellee, the appellee agreed to pay seventy cents monthly on each share of his stock, and in default thereof for more than four months such stock shall lapse and the amount paid in shall be transferred to the funds of the association. The answer further avers that in April, 1894, appellee defaulted in the payment of his monthly instalments, since which time he has never made any payments thereon, and that by reason of such failure said stock lapsed and had been transferred to the other funds of the associa-

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tion more than a year previous to the beginning of the suit. A copy of the by-laws accompanies this paragraph of answer as an exhibit. Appellee replied by general denial. There was a trial by jury resulting in a general verdict for appellee. With the general verdict the jury answered and returned certain interrogatories submitted to them upon special questions of fact. Over appellant's motion for a new trial, judgment was rendered on the verdict.

The appellant has assigned errors as follows: (1) That the court erred in overruling the demurrer to the complaint; (2) that the complaint does not state facts sufficient to constitute a cause of action, and (3) that the court erred in overruling the motion for a new trial. The first and second specifications of the assignment of errors may be considered together.

The complaint proceeds upon the theory that appellee was entitled to recover of appellant the amount paid into its treasury upon his stock, less any and all fines and other charges thereon, upon his withdrawal. The right of a member of a building and loan association to withdraw from it, upon certain conditions, is a statutory right, and the manner of his withdrawal and the terms thereof, are likewise fixed by statute. §3410 Horner 1897. The language of the statute is: "Any stockholder wishing to withdraw from such corporation may do so upon three months' notice given to the board of directors, when such withdrawing stockholder shall be entitled to receive the amount paid in upon the stock to be withdrawn, less all fines and other charges thereon: *Provided*, that when the withdrawal occurs after the expiration of one year from the beginning of the series in which the stock to be withdrawn was issued, he shall receive in addition to the amount paid in, less fines and other charges as aforesaid, at least legal interest on each instalment paid from the date at which the same was payable: *Provided*, that at no time

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shall more than one-half of the funds in the treasury be applicable to demands of withdrawing stockholders, unless the board of directors in its discretion shall order otherwise, and the board may, in its discretion, waive the notice hereinbefore required as to any withdrawal; no stock shall be withdrawn which is at the time held in pledge for security." The section of the statute from which the above quotation is taken also provides that, "Every share of stock shall be subject to a lien for the payment of unpaid instalments and other charges incurred thereon under the provisions of the constitution and by-laws."

Appellant's learned counsel urge that the averments of the complaint do not show that the conditions prescribed by statute by which appellee might withdraw his stock existed when he attempted to withdraw, and hence, for a failure to show such conditions, the complaint is bad. It is first claimed that it is not averred that his shares of stock were not held "subject to a lien for the payment of unpaid instalments or other charges." The complaint shows that appellee became the owner of his shares of stock in September, 1891; that he made his monthly payments beginning with September, 1891, and continuing to and including the month of April, 1894, and that he paid each month the sum of \$3.50. It seems plain that under these allegations there could have been no lien in favor of the association for unpaid instalments, for it clearly appears that appellee had paid all instalments upon his stock as they became due. It is further charged that when he paid his last instalment he notified the board of directors that he wished to withdraw, and asked that he receive back the amount paid in upon his stock, less all fines and other charges, together with interest, etc. If appellee paid the instalments on his stock as they became due, we are unable to see what lien the association would have upon his stock for unpaid instalments and "other charges." In any event, if the association had any such lien, it was unnecessary for appellee to aver the same, but it was

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a matter of defense to be set up by way of answer. If appellee had not forfeited his stock,—and the complaint shows that he had not,—he had a right to withdraw, and upon notice of his intention to withdraw, it was the duty of the appellant after the lapse of the time fixed by statute, to pay to him the sum paid in by him, and if more than a year had elapsed after he became the owner of the stock, as is shown by the complaint in this case, to pay, in addition thereto, at least legal interest on each instalment paid from date at which the same was payable, “less fines and other charges as aforesaid.” It is plain from both the spirit and the letter of the statute that the appellant association was required to pay to appellee the amount paid in on his stock, with legal interest, less fines and other charges. If the association had any lien upon appellee’s shares of stock for unpaid instalments, fines or other charges, it was its duty to discharge such liens from the amount in its hands and pay him the residue, provided he had complied with all requirements on his part.

Another provision of the statute is that “no stock shall be withdrawn which is at the time held in pledge for security.” Appellant insists that the complaint is bad for a failure to aver that appellee’s stock was not at the time “held in pledge” for security. It is urged that appellee may have become a borrower, and his shares of stock held in pledge for security. Where a stockholder in a building and loan association has borrowed money on his stock, it is not a debatable question but what such association would hold such stock “in pledge for security.” It is equally clear that under such facts the stockholder would not be entitled to withdraw from the association, nor entitled to any of the rights of a withdrawing stockholder, until he should redeem his stock from such pledge. These questions were settled in the case of *Anderson Building, etc., Assn. v. Thompson*, 88 Ind. 405. These objections which appellant urges to the complaint do not seem to us to be well taken. These objections thus urged are exceptions to the statutory right of the stock-

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holder to withdraw, and, while the exceptions are also statutory, we do not think, under the code practice of pleading that it was necessary to negative them. The rule of pleading in such cases is that, when the exception is embraced in the clause, he who pleads the clause should also plead the exception; but where there is a clause for the benefit of the pleader, and there follows a proviso which is against him, he may plead such clause, and it then becomes the duty of his adversary to plead the proviso or exception. Bliss on Code Pl. 202.

Mr. Works, in his Pleading and Practice, at §365, says: "It was a rule of pleading at common law that if an exception in a statute appeared in the enacting clause, the declaration must show that the plaintiff, or the action brought, was not within the exception; but where the exception appeared in the proviso, it was not necessary to notice it in the complaint. The rule is thus stated: The rule usually laid down upon this subject is that where matter is introduced by way of exception into a general clause, the pleader must show that the particular case does not fall within such exception; whereas a proviso need not be noticed by him, but must be pleaded by the opposite party. The difference is, where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso, which is against him, he should plead the clause, and leave it to the adversary to show the proviso. * * * The test is, whether the exception is necessary to be alleged to constitute a cause of action. If so, it must be averred, no matter in what part of the statute it occurs." See, also, Stephen Pl. 443.

The right of a stockholder to withdraw from a corporation is a statutory right, at least in cases of this character. Here the statute confers upon him that right, and specifies what he shall receive in return. After granting to him this right, and placing upon him the necessity of giving the corpora-

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tion a three months' notice, the statute contains certain provisions. Measured by the rule we have just cited, it was not necessary for appellee to make the averments contended for by appellant, and which we have had under discussion.

Another objection urged to the complaint is that there is no averment that there were funds in appellant's treasury which could be applied to the payment of appellee's demand for withdrawal. Upon this question, the authorities are not in accord. Our own courts have not had the question before them in any reported case we have been able to find. In *Heinbokel v. National, etc., Assn.*, 58 Minn. 340, 59 N. W. 1050, the exact question here presented was raised and decided in harmony with appellant's contention. The Minnesota statute, under which that case arose, was very similar to our statute, and the provisions relating to a stockholder's right to withdraw were in all essential particulars like ours. The Minnesota statute provided that not more than one-half the amount received on stock should be used to pay withdrawals without the consent of the board of directors. A by-law of the association contained a similar provision. In the course of the opinion the court said: "Can a nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, be permitted to bring an action and take judgment against the association when, by reason of the statute and the by-laws, there is no money in the treasury legally applicable to the payment of his claim?" This inquiry the court answered in the negative, and its conclusion was, to use its own language: "It follows that there must be proper allegations in the complaint and proof upon trial as to the existence of funds out of which payment can properly be made." In *Maloney v. Real Estate, etc., Assn.*, 57 Mo. App. 384, the same conclusion was reached. These are the only cases we have been able to find which hold squarely to the above rule.

The supreme court of Pennsylvania, in a well considered

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case (*United States, etc., Assn v. Silverman*, 85 Pa. St. 394), declared a contrary doctrine. The Pennsylvania statute there under consideration was almost identical in language to the Minnesota statute, and so similar to our own that we deem it important to quote it here, as follows: "Every share of stock shall be subject to a lien for the payment of unpaid instalments, and other charges incurred thereon, under the provisions of the charter and by-laws. * * *

Any stockholder wishing to withdraw from the said corporation, shall have power to do so by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such proportion of the profits as the by-laws may determine, less all fines and other charges. *Provided*, That at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of the withdrawing stockholders, without the consent of the board of directors."

In the *Silverman* case, 85 Pa. St. 394, the question we are now considering arose by way of answer, 'wherein it was alleged that there were no funds in the treasury with which to pay the amount of plaintiff's claim on his withdrawal, and that fifty per cent. had then been applied to the demands of withdrawing stockholders, and that the consent of the directors to pay in excess of that amount had not been obtained. After quoting the statute above set out, the court by Mr. Justice Gordon, in discussing the question, said: "It will be seen from the above, that after thirty days' notice the membership of the stockholder is determined, and he becomes a creditor of the corporation to the amount he has paid, less fines and charges. That he may, upon the refusal of the company to pay him, sue it, and recover judgment just as any other creditor, is not doubtful. It is urged, however, that he is estopped, by the proviso, from legal process for the recovery of his money, until the treasury has funds to meet his claim. If this be the true interpretation of the statute, then is this creditor in a most unfortunate position;

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for the corporation may never choose to make the necessary provision for such purpose, and therefore he can never have process to compel it to do so. * * * Looking at the statute as a whole, we are not prepared to adopt an interpretation so contrary to its spirit and the plain dictates of justice. Whilst it is certainly intended that the operations of the corporation shall not be embarrassed by having the whole amount of its cash assets taken, in order at once to pay withdrawing stockholders, yet it as certainly does not intend that no provision shall be made for their payment, and that they may be indefinitely postponed, even from judgment, by a plea of *quasi insolvency*." In harmony with the Silverman case are the following: Endlich on Building Associations, §§111-114; *National, etc., Assn. v. Hubley*, 34 Leg. Int. (Pa.) 6, 24 L. J. 50; *Bethoven Building Assn. v. Weber*, (Pa.) 5 Atl. 236, 3 Central Rep. 916.

We think these cases rest upon sounder reason and stronger equity than the cases holding the contrary doctrine, and follow them as being in harmony with both the letter and the spirit of our statute. The fact that the statute gives a member the right to withdraw, upon specified conditions, carries with it the necessary and corresponding duty of the association to make reasonable provision for carrying out the provisions of the statute. Some of the authorities go so far as to hold that it is the duty of the association to keep itself, as far as practicable, and in accordance with the dictates of experience and reason as to the probable amount required for withdrawals, in readiness to meet their demands. See Endlich on Bldg. Associations, §113; *Wolfe v. Saving Assn.* 75 Hun 201, 27 N. Y. Supp. 44; *National, etc., Assn. v. Hubley, supra*.

If the position of appellant is correct, then a withdrawing member of an association of this character would be left to the mercy and caprice of the association; for it is evident that if the directors so desired, the treasury of the association would be kept without funds, and thus the rights of the with-

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drawing members would be disregarded, and both the letter and the spirit of the statute would be annulled. We must hold, therefore, that appellee was not required to aver in his complaint, as a condition precedent to his right of action, that there were funds in the treasury with which to pay the amount due on the withdrawal of his stock.

It is next urged that the complaint is bad because a copy of the constitution and by-laws of the association was not filed as an exhibit. It is sufficient answer to this to say that such constitution and by-laws did not constitute the foundation of the action. The action was based upon the statutory right to withdraw, and was for the recovery of the amount appellee had paid in, less fines and charges, together with the accrued interest. It was unnecessary for him to file a copy of the constitution and by-laws as an exhibit to his complaint. Some other objections to the complaint have been suggested, but we think they are frivolous and not well taken. While the complaint might have been fuller in detail and more specific in some particulars, it stated a cause of action, and there was no error in overruling the demurrer to it.

In its motion for a new trial appellant assigned sixteen reasons. The first reason assigned is that the verdict is not sustained by sufficient evidence. The second does not present any question, and the third is that the verdict is contrary to law. The first and third reasons may be considered together.

Appellant urges that the evidence wholly fails to show that appellee notified the board of directors that he wished to withdraw his stock. The statute makes it obligatory upon a member who wishes to withdraw to give to the board of directors three months' notice, etc. It was necessary for the complaint to aver that such notice had been given, and as this was a material averment, it follows that it was necessary for appellee to prove that such notice had been given. If the evidence fails to show that such notice was given, then

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the verdict is not sustained by sufficient evidence, and the judgment will have to be reversed. If we adopt as true all the evidence on behalf of appellee upon this point, we do not see how it can be successfully claimed that he complied with the duty imposed upon him by statute. By such evidence it is shown that appellee paid his monthly dues continuously from September, 1891, to and including April, 1894; that after the last named date he did not make any other payments; that in May, 1894, he informed the secretary of appellant association that his financial condition was such that he could not keep up his payments, that he would have to withdraw; that the secretary advised him not to do so; that nothing more was said about the matter till January, 1895, when the secretary told him that he was entitled to part of the money; that the secretary then told him he would see to it and lay it before the board of directors; that he then waited about two months, when he called on the secretary and was notified by him that the board of directors declined to pay him anything. It also appears from the evidence that appellee did not at any time appear before the board of directors or give them any notice of his wish to withdraw. On the other hand, the secretary denies that appellee ever gave him any notice of withdrawal, or expressed to him a wish to withdraw. He further testified that after he had ceased his payments he notified him at least twice of his delinquency, and called upon him to try to get him to pay up his back dues, so that he would not lose what he had paid in; that he refused to do this, and after a lapse of nearly two years, he transferred his stock to the association under the provisions of §10, article 6, of the by-laws, which provide that: "Stock upon which four consecutive instalments have not been paid shall lapse, and the amount standing to the credit of such shares shall be transferred to the loan fund." It further appears by the evidence of the secretary that he never mentioned the matter of appellee's withdrawal to the board of directors until a short time before the com-

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mencement of this action, when he did so at the request of the attorney for appellee. The evidence is uncontradicted that this is all the notice the board of directors ever received, and that was nearly three years after appellee had ceased paying dues, as the record shows this action was commenced March 23, 1897. At this time at least a year had lapsed since the secretary had transferred appellee's stock to the loan fund, as above mentioned. The board of directors declined to take any action upon receipt of this notice. From this evidence the jury might have found, and evidently did find, that appellee notified the secretary that he wished to withdraw, and that the secretary promised to convey the information to the board of directors. It is plain from an examination of the whole record that the trial court went upon the theory that such notice was sufficient and constituted notice to the board of directors, for the jury were so instructed. We cannot concur in this view of the law. In cases of this character, as we have above remarked, the right of a stockholder to withdraw from a corporation is a statutory one. If he wishes to exercise that right, he must comply with the provisions of the statute which confer upon him such right. The statute says: "Any stockholder wishing to withdraw from such corporation may do so upon three months' notice given to the board of directors." We must construe this statute as meaning just what it says, and hence hold that notice to the secretary is not sufficient. At most, under the facts as disclosed by appellee's evidence, the secretary was the agent of appellee to convey such notice to the board of directors, and his failure to do so was the failure of appellee himself, and for such failure he cannot complain. In saying this, we do not mean to hold that if the secretary had conveyed the information to the board of directors it would have constituted a valid and binding notice, for that question is not before us. Cook on Stock and Stockholders and Corp. Law, at §727, (3rd ed.) says: "It is well settled that a corporation is not chargeable with knowledge of facts

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merely because those facts were known to its incorporators or stockholders or clerk. But the corporation has notice of facts which come to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control." 1 Beach on Pri. Corp. §185, says: "Nor is it enough that notice should be given to one who is an officer and in his official character. He must also be the proper officer to receive notice of the particular transaction." A further discussion and citation of authorities upon the question now before us would be useless.

The evidence wholly fails to show the required statutory notice to appellant's board of directors of the intention or wish of appellee to withdraw, and as this failure relates to a material question of fact, the verdict is not sustained by sufficient evidence. Upon the essential fact of notice, there is absolutely no evidence to support the verdict, and where there is no evidence to support the verdict, then such verdict is an error of law which may be reviewed and corrected in the appellate tribunal. *Deal v. State*, 140 Ind. 354, and cases there cited; *Robbins v. Spencer*, 140 Ind. 483. As this conclusion leads to a reversal of the judgment, other questions presented by the record need not be noticed. The judgment is reversed, and the court below is directed to sustain appellant's motion for a new trial.

STEPHENSON v. GILLASPIE.

[No. 2,929. Filed October 31, 1899.]

APPEAL AND ERROR.—Final Judgment.—Dismissal.—Where it is not shown by the record that a final judgment was rendered, the appeal will be dismissed.

From the Monroe Circuit Court. *Appeal dismissed.*

J. E. Henley and J. B. Wilson, for appellant.

C. E. Weir, for appellee.

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BLACK, J.—The appellant has assigned here that the court erred in overruling his demurrer to the second paragraph of the appellee's reply, and that the court erred in its conclusions of law upon the findings of fact in a special finding. The transcript of the record before us does not set forth a final judgment in the cause or show that one was rendered. Therefore, the questions discussed in the briefs of counsel can not be decided by us in this case. Appeal dismissed.

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[No. 2,698. Filed November 1, 1899.]

VERDICT.—Special Findings.—Conflict.—The general verdict will be upheld unless the facts found and stated in the special findings are so antagonistic to the general verdict as to preclude reconciliation. *p. 191.*

MASTER AND SERVANT.—Defective Machinery.—Knowledge of Danger.—A manufacturing company is not chargeable with actionable negligence on account of its failure to place guards over the revolving knives of a wood jointing machine in order to protect the operator, where the danger was open and obvious. *pp. 192-203.*

SAME.—Notice of Danger.—Negligence cannot be based upon the failure of an employer to warn an operator of a wood jointing machine of the increased danger incident to planing a small stick of timber. *pp. 192-203.*

VERDICT.—Special Finding.—Conflicts.—Master and Servant.—A general verdict for plaintiff on an allegation of the complaint charging that defendant was negligent in not warning plaintiff of the increased danger in operating a wood jointing machine while planing short, narrow, and thin pieces of lumber, as compared to larger and heavier pieces is in irreconcilable conflict with a special finding that such increased danger was as apparent to plaintiff as to defendant. *pp. 203-207.*

From the Marion Superior Court. *Reversed.*

W. A. Ketcham, S. N. Chambers, S. O. Pickens, C. W. Moores and F. E. Matson, for appellant.

D. W. Howe, J. R. Morgan and L. A. Morgan, for appellee.

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WILEY, J.—This was an action by appellee against appellant to recover damages for an injury received, while in the employment of appellant, caused by the alleged negligence of the latter. The complaint, which is in one paragraph, avers that appellant owned and operated a factory, and was engaged in manufacturing and repairing wagons and other vehicles; that in carrying on said business, appellant had and used machinery of various kinds, which was propelled by steam; that a part of such machinery consisted of a jointer, constructed with an iron or steel top or table, about six feet long and about one foot wide, in the center of which was an opening about one foot in length and four inches wide; that immediately under said opening were revolving knives, so placed as to come in contact with lumber placed upon such table; that said jointer was operated by steam power communicated by wheels, pulleys, and other mechanical devices, so as to cause said knives to revolve with great rapidity; that the mode or plan of using said jointer was to place lumber on the table and push it along by hand and thus plane or cut it down to smaller dimensions; that when the jointer was in operation there was danger to the person operating it of his hand slipping from the lumber being pushed over said opening and falling upon the revolving knives; that said danger was very greatly increased in proportion as the piece of lumber was short, narrow, and thin, and because of the fact that a short, thin, and light piece of lumber was more violently jostled and more unsteady in passing over the knives than a thick and heavy piece would be, but that such danger was not obvious to any one who was not accustomed to the use and operation of the same; that there were no guards or apparatus or contrivance used in or about such jointer to prevent or guard against danger to the person operating it in case his hand should accidentally slip off the lumber being planed, and into said opening; that appellant well knew the danger incident to the operation of said jointer, and might easily have prevented or

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guarded against the same by attaching guards which could have been attached at an expense of fifty cents; that appellee was employed by appellant, some time prior to the accident hereinafter described, to work in and about said factory; that appellee was then about twenty-one years of age, and had never been familiar with operating machinery of any kind, and had had no experience in the operation of jointers or other similar machinery, nor any knowledge of the danger thereto, all of which appellant well knew; that on December 10, 1895, while appellee was so employed, he was directed by appellant to take some pieces of timber and plane them upon said jointer; that said pieces were about twelve inches long and not over one and one-half inches square; that they were very greasy and slippery; that there was great danger to the workman who might undertake to plane them, but of such danger appellee had no knowledge or experience whatever; that appellant, well knowing said danger and appellee's ignorance thereof, nevertheless negligently failed to guard against the same in any way, and negligently failed to advise appellee thereof, or instruct him how to operate the jointer in such a way as to prevent or lessen such danger; that appellee, in pursuance to such directions, undertook to plane one of the pieces, and while so doing, and using due care, his hand, by reason of the jostling and unsteadiness of such piece of lumber in passing over the revolving knives and the "slipperiness" thereof, slipped from the same and into said opening and came in contact with the revolving knives, whereby he was injured, etc. The complaint concludes by averring that appellee's injuries were caused solely by the negligence of appellant, and without any fault or negligence on his part. A demurrer for want of facts was overruled, and appellant excepted.

The issues were joined by an answer in general denial, trial by jury resulting in a general verdict for appellee for \$3,000, and with the general verdict the jury answered and returned certain interrogatories submitted to them.

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Appellant moved for judgment upon the answers to interrogatories and for a new trial, both of which motions were overruled. The overruling of the demurrer to the complaint, the overruling of the motion for judgment on the answers to interrogatories notwithstanding the general verdict, and the overruling of the motion for a new trial, are each assigned as errors.

The first question discussed by counsel is the overruling of appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict. We enter upon the discussion of this question, with the rule in view, that the general verdict is a finding in favor of appellee, and against the appellant, upon every material fact necessary to the former's right to recover under the averments of his complaint, and that, unless some facts established by the special findings are in irreconcilable conflict with a fact material and necessary to the appellee's recovery, the general verdict must prevail. We must indulge every reasonable presumption in favor of the general verdict. *Rogers v. City of Bloomington*, 22 Ind. App. 601, and authorities there cited. Where, however, the interrogatories propounded to the jury, answered by them and returned with the general verdict, are in irreconcilable conflict with it, the former will control. In other words, the general verdict will be upheld unless the facts found and stated in the special findings are so antagonistic to the general verdict as to preclude reconciliation. *Ohio, etc., R. Co. v. Trowbridge*, 126 Ind. 391; *Toledo, etc., R. Co. v. Adams*, 131 Ind. 38; *Town of Poseyville v. Lewis*, 126 Ind. 80; *Rogers v. Leyden*, 127 Ind. 50; *Block v. Hazeltine*, 3 Ind. App. 491; *Evansville, etc., R. Co. v. Gilmore*, 1 Ind. App. 468; *Rogers v. City of Bloomington*, *supra*.

In *Korrady v. Lake Shore, etc., R. Co.*, 131 Ind. 261, Elliott, C. J., in delivering the opinion of the court, says: "Where the facts stated in an answer to an interrogatory are such as preclude a recovery, the court must so adjudge,

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although answers upon other points may be favorable to the party who relies upon the general verdict. If facts are found which are fatal to a recovery, the court is bound to deny the plaintiff a judgment, whether such facts relate to one or to many points. A defendant who establishes a point which completely and effectually destroys the alleged cause of action must necessarily succeed." See, also, *Rice v. City of Evansville*, 108 Ind. 7; *Lake Shore, etc., R. Co. v. Pinchin*, 112 Ind. 592.

We turn now to the facts specially found to see if they, or any of them, are in irreconcilable conflict with the general verdict, and they are as follows: That appellee was twenty-one years old; that he had four or five years experience in working in hard wood such as used by appellant in his factory, such work having been done with hand tools; that his eyesight was good; that appellee commenced working for appellant in his factory September 1, 1895; that he received the injury complained of December 10, 1895; that his employment was continuous between said dates; that the jointer described in the complaint was in use when appellee commenced work for appellant; that it was continued in use all the time up to appellee's injury; that the jointer was the same as was in general use in planing mills and other wood-working establishments in Indianapolis; that the jointer was constructed with an iron or steel top or table about six feet long and eight inches in width, across the center of which was an opening two and one-quarter inches wide, beneath which opening were revolving knives, so placed as to come in contact with timber placed on the table; that the jointer was used by the workmen by putting the knives in motion, placing the timber to be planed on top of the table, and then pushing the timber with the hands upon and over the knives in the opposite direction to their movement; that, in using the jointer, the workmen would stand in front of the table and near the opening in which the knives revolved; that while appellee was in the employment of appellant there was

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an adjustable gauge or guide attached to the top of the table; that there were slots and set screws at the back of such gauge by which it could be moved backward or forward so as to cover the whole length of the revolving knives, except that portion being used to plane with, and corresponding with the piece of timber being planed; that such gauge was four or five inches high and about two and one-half to three feet long; that the top of the table was about three feet high from the floor; that the adjustable gauge and the slots and screws for its adjustment were open to the view of the workmen when standing in front of the top of the jointer while operating it; that such gauge could be moved by the workmen from the back to the front so as to shut off from the workmen all of the portion of the revolving knives not needed in planing a piece of timber; that there was no other guard or contrivance on or about the jointer to prevent or guard against danger; that the jointer remained in the same condition during all the time appellee worked for appellant; appellee knew there was no guard or contrivance on the jointer to prevent or guard against danger, except the adjustable gauge or guard above mentioned; that there was no other guard or contrivance on the jointer was open and obvious to the view of appellee when working upon the jointer; that when appellee was injured he was planing a piece of timber on the jointer about twelve inches long; that said piece of timber was greasy and slippery; that appellee knew it was greasy and slippery before he started it upon the knives; that appellee's hands came in contact with the knives by the reaction of the piece of timber; that, if appellee had known how, he could have placed the adjustable gauge which was on the jointer so as to shut off all the portion of the knives he was not using; that this would have had the same effect in preventing appellee's hand from coming in contact with the knives that any other guard which could have been used would have had; that during the time appellee worked for appellant he occasionally worked on the jointer; that the jointer was used

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in appellant's factory to plane or dress down timber; that appellee saw the workmen thus using the jointer; that while appellee was in appellant's employment he had worked on sections of wagon felloes, wagon rims, bolsters, head blocks, buggy shafts, wagon tongues, and such pieces of timber as are ordinarily used in repairs of wagons, etc.; that he used the jointer to dress down and plane some of such pieces; that during the time appellee worked for appellant he used the jointer ten or fifteen times a week; that one of the pieces of timber appellee had dressed down was about the same size as the one he was working on when he was injured; that appellee commenced using the jointer about two weeks after he commenced work, and used it thence one to three times a day; that he had, prior to his injury, dressed and planed upon the jointer pieces of timber called head blocks from thirteen to eighteen inches long, from one to two and one-half inches thick, and from one and one-half to three inches wide; that he also dressed down and planed on the jointer wagon rims, about as long as half the circumference of a wagon wheel, from two to three inches thick, and from one to one and a half inches wide; that the times appellee worked on the jointer amounted to as much as one entire day; that if there was any danger to appellee while planing the piece of timber when he was injured it was due to the fact that his hands were close to the revolving knives of the jointer and the possibility of there being a knot or cross-grain in the timber; that immediately before his injury appellee had planed on the jointer a piece of timber of the same kind of wood and similar in size to the piece he was planing when he was injured; that a man of average intelligence working on the jointer would immediately learn that the revolving knives would offer resistance to a piece of timber being planed upon them; that a person of ordinary intelligence would learn the first time he worked on the jointer that it would be necessary to apply force to push a piece of timber across the knives and keep it in place;

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that, while appellee was working for appellant, the latter was engaged in manufacturing and repairing wagons and other vehicles; that he had a machine which he used in his business commonly called a jointer, upon which appellee was injured; that appellee was employed by appellant as a wagon-maker and wagon-repairer; that appellee was so engaged when he was hurt; that appellee was a man of ordinary intelligence; that prior to his injury appellee did not know, nor could he have known by the exercise of ordinary care and observation, that the adjustable guard could be moved forward so as to cover that portion of the knives not needed for planing the piece of timber which he was at work upon when he was injured; that when the jointer was in operation, there was danger to the workman operating it of his hand slipping from the lumber being pushed over the opening and falling on the knives; that in pushing a short, narrow, and thin piece of timber over the knives it was more liable to be violently jostled and to be more unsteady than a thicker and heavier piece; that the danger to the workman was increased in proportion as the piece of lumber being pushed over the knives was short, narrow, thin, and light; that the danger would have been lessened by a guard; that such guard could have been used without interfering with the jointer; that such guard could have been supplied at an expense of fifty cents; that prior to appellee's injury no such guard or apparatus was used about the jointer; that prior to his employment by appellant, appellee had not been accustomed to operating machinery of any kind; that prior thereto appellee did not have any knowledge of the dangers incident to the use of jointers; that when appellant employed appellee, he (appellee) did know of the dangers incident to the operation of such machinery; that on December 10, 1895, appellant's foreman directed appellee to take some pieces of timber and plane them upon the jointer; that the pieces of timber appellee was working on when he was injured were about twelve or fourteen inches long and not

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over two inches square; that the danger to the workmen who might undertake to plane such pieces on the jointer was not increased by reason of their being slippery and greasy; appellee was ignorant of the increased danger of planing such pieces by reason of their shortness and thickness; that appellant's foreman did not advise appellee of the increased danger on account of the shortness and thickness of the pieces; that appellee's hand was caused to slip and come in contact with the revolving knives, whereby he was injured, by reason of appellant's failure to use guards in connection with such jointer and also the failure of appellant to advise appellee of the increased danger by reason of the shortness and thickness of the pieces of timber, etc.

We have given a full statement of the facts specially found, to the end that the question under consideration may be fairly discussed. If we clearly understand the theory of the complaint, appellee plants his right of recovery upon two basic propositions: (1) That appellant was negligent in failing to provide a guard to be adjusted over the revolving knives, except that portion required for doing the work intended, at which appellee was engaged, so as better to protect him from danger; (2) that it was negligence on the part of appellant in failing to warn him or advise appellee of the increased danger to him incident to the particular work in which he was engaged, resulting from the size and length of the piece of timber he was planing when his injury occurred. As we have seen, the jury by their general verdict determined these alleged acts of negligence adversely to appellant. In other and more direct language, by the general verdict the jury found that appellant was negligent in the two particulars specified and as charged in the complaint. This finding by the general verdict must stand, unless facts are affirmatively established by the special findings which are so antagonistic to the facts established by the general verdict that the two can not be reconciled upon any reasonable hypothesis. It is not claimed in the complaint, or in

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argument, that the jointer was in itself defective or out of repair, while on the contrary it is shown that it was not, but was such as was in general use in planing mills and other wood-working establishments. It is charged and is fully shown that it was a dangerous machine. It is claimed by appellant that the danger was incident to the ordinary operation of the machine, and that appellee, in its use, assumed the risk incident thereto. We need not discuss the well established rule that the employe is held to assume the ordinary risk incident to the work or service he so engages to perform. While the complaint avers that the danger to appellee was increased by the greasy and slippery condition of the pieces of timber he was planing, such fact is determined adversely to appellee by the special findings. This finding eliminates that question from the case. While it is not seriously contended by appellee's learned counsel that appellee's injury resulted from a danger incident to the ordinary operation of the machine, yet it is strenuously urged that the danger would have been greatly lessened by the use of a guard or apparatus so placed as to prevent the hand from coming in contact with the knives, as found by the jury. It is also contended that it was the duty of appellant to furnish his employe with safe appliances and machinery with which to work, and that that duty required him to provide a guard to protect the employe's hands from the revolving knives. That an employer must furnish his employe with reasonably safe appliances and machinery with which to work is so firmly established by the authorities that the question is no longer debatable. If, therefore, it was the duty of appellant to furnish the guard described in the special findings, so as to bring him within the rule just stated, then his failure to do so would constitute actionable negligence under the averments of the complaint, unless it appears that appellee, with a knowledge of the facts, used the machine in its then condition. But we must remember that the duty to furnish reasonably safe appliances and

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machinery does not carry with it the additional burden of making the employer an insurer against injury to his employe. The rule was well and forcibly stated by Mitchell, J., in *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, as follows: "The employer does not, however, become an insurer of the employe against injury, nor does he covenant to supply tools and appliances that are safe beyond any peradventure or contingency, nor to furnish implements of the best, or most approved, or of any particular design." See *Burke v. Witherbee*, 98 N. Y. 562; *Powers v. New York, etc., R. Co.*, 98 N. Y. 274; *Lake Shore, etc., R. Co. v. McCormick*, 74 Ind. 440. The rule is that what the employer specially engages is that he will not expose the employe to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to and within the ordinary risks of the service which he engages to perform. *Jenney Electric Light, etc., Co. v. Murphy, supra*. The rule applicable to the assumption of the risk on the part of the employe incident to his service is not a varying but a comprehensive one. It embraces within its scope not only such risks as are apparent to the employe by reasonable and ordinary observation, or as are readily discernible by a person of his age, intelligence, and capacity in the exercise of ordinary care, or where his means of knowledge of the dangers that confront him are equally as good as those of his employer, or where he makes discovery of the unusual risks and makes no complaint. *Alcorn v. Chicago, etc., R. Co.*, 108 Mo. 81; *Ames v. Lake Shore, etc., R. Co.*, 135 Ind. 363; *Sheets v. Chicago, etc., R. Co.*, 139 Ind. 682; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561. Mr. Wharton at §214 of his work on Negligence, says: "Where an employe, after having an opportunity of becoming acquainted with the risks of his situation, accepts them, he can not recover for injuries thereby received." In *Evansville, etc., R. Co. v. Henderson*, 134 Ind. 636, we find an able discussion by Mr.

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Chief Justice Coffey upon the question of the waiver of an employe of his right of action against his employer for injuries resulting from ordinary dangers incident to the business in which he is engaged. It was said: "This waiver includes, on the part of the servant, all such risks as, from the nature of the business, usually and ordinarily conducted, he must have known when he embarked in the master's service, and, also, those risks which the exercise of his opportunities for inspection, while giving diligent attention to such service would have disclosed to him." In at least two cases in this State the Supreme Court have held that a railroad company is under no obligation or duty to place blocks between the rails where a switch connects with the main track, so as better to protect its employes from getting their feet fast in the angle thus made, and thus increasing the hazard of the service. *Ames v. Lake Shore, etc., R. Co.*, 135 Ind. 363; *Sheets v. Chicago, etc., R. Co.*, 139 Ind. 682. In the latter case, the court said: "The claim is therefore made, that the appellee was negligent in not constructing its track in a proper manner, or in not furnishing proper equipment therefor, so as to make the same safe to the employes while engaged in the discharge of their duties. Conceding that these blocks are a practical device, and reasonably adapted for the purpose of protecting frogs and switches, the fact that there were no blocks used could be easily ascertained by any one inclined to look at them; the danger incident thereto was obvious, but easily avoided by the exercise of reasonable care. It is not claimed that the switch was improperly constructed, or that it was not suitable for the purposes for which it was intended, or that the danger to persons in getting their feet caught therein could not be avoided. It is not a case of the use of obviously defective machinery or implements with which the deceased was called upon to work, of which defects he had no knowledge; it is not a case of conditions involving secret defects not obvious to the servant, the existence of which the master knew or ought

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to have known. That the switches on this line of road were unblocked, was known to both master and servant, and whatever danger was incident thereto, was apparent to both. There was no fraud, no suppression of conditions, and no misunderstanding as to contingencies."

The case of the *Wabash, etc., Co. v. Webb*, 146 Ind. 303, is directly in point. There appellee was in the employment of appellant. In attempting to step over a shaft his clothing near his left foot was caught by a projecting oil cup and set screw, which threw him down, and he was injured. He testified that he did not see the oil cup and set screw; that they could not be seen when the shaft was revolving; that the shaft was always revolving when he saw it, and that he did not know of the existence of the cup and set screw. He based his right of recovery on the theory that it was the duty of appellant to have boxed the shaft, oil cup, and set screw, so as to obviate the danger in stepping over the revolving shaft. Howard, J., in delivering the opinion of the court, said: "It is possible that gearings, set screws, pulleys, belts and other such exposed parts of machinery might be rendered more safe by being boxed. But well conducted mills are without this extra care; and if usual and ordinary care is shown in the procurement and maintenance of machinery, that is all that can be asked. Extraordinary care can not be demanded; and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employe. And if it be conceded that the oil cup and set screw could not be seen when the shaft was in motion, yet we cannot for that reason say that such necessary and usual attachments constitute a hidden defect to one who for nearly two years has been an employe in the paper mill where they are found, and who for three weeks has been engaged in the very room where they are used, constantly working around, oiling and cleaning the very machinery to which they are attached."

The Supreme Court of Massachusetts in the case of *Sul-*

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livan v. India Mfg. Co., 113 Mass. 396, states the rule in such case, as now before us, as follows: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents therefore to occupy the place prepared for him, and incurs the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." See, also, *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368. There appellee was injured while working in appellant's woolen mills while at work with a shearing machine. In operating the machine the cloth passed close to a stationary knife, over against which was a revolving cylinder, upon which were eighteen knife blades, and over which there was no guard. While in this service appellee was injured. In deciding the case, the court said: "The machine was dangerous only because there was danger in working upon it; and, if it was in fact dangerous, it was immaterial that the danger might have been averted by appliances protecting against it. * * * If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have prevented the danger by guarding against it." Upon the same question is *Murphy v. American Rubber Co.*, 159 Mass. 266, 34 N. E. 268, in which the court said: "There is no absolute

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duty on the part of an employer to box his machinery. And under the circumstances of the case there was no duty on the part of the employer to instruct the plaintiff that the coupling on the shaft was not boxed. The fact was obvious and it must be assumed that he could see the condition of things. When the dangerous character of the machinery is in plain sight, a workman ordinarily must take notice, and no duty rests on the employer to point this out." See, also, *Foley v. Pettie Machine Works*, 149 Mass. 294, 21 N. E. 304; *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255; *Rooney v. Sewall, etc., Co.*, 161 Mass. 153, 36 N. E. 789; *Kelley v. Silver Spring, etc., Co.*, 12 R. I. 112. In *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286, plaintiff was a girl fourteen years old and was working in a laundry. Her hand was caught between two rollers, drawn through and crushed. There were no guards or other appliances to protect the employe's hands from the rollers. In delivering the opinion of the court, Peckham, J., said: "But the plaintiff, in accepting this work and entering upon the employment about this machine, assumed the usual risks and perils of the employment and such as were incident to the use of this machine in its then condition, so far as such risks were apparent. I speak of this as the general rule, and, whatever exception there may be to it on account of the youth of the plaintiff will be spoken of hereafter. But upon the general proposition as to the use of machinery, there is no doubt that an employe in accepting service with a knowledge of the character and position of the machinery, the dangers of which are apparent, and from which he might be liable to receive injury, assumes the risks incident to the employment, and he can not call upon the defendant to make alterations to secure greater safety." In many cases in this State the courts of last resort have held that where a servant is employed to work in a place that is obviously dangerous, and he has an equal opportunity with the master to observe the danger, he assumes all risk of injury that may result from

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such dangers. *Railsback v. Turnpike Co.*, 10 Ind. App. 622; *Romona Stone Co. v. Tate*, 12 Ind. App. 57; *Baltimore, etc., R. Co. v. Leathers*, 12 Ind. App. 544; *Louisville, etc., R. Co. v. Quinn*, 14 Ind. App. 554; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; *Peirce v. Oliver*, 18 Ind. App. 87; *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21. When a servant undertakes to engage in a master's service, and to perform certain duties, the master has a right to assume that he is qualified to perform the duties of the position he seeks to occupy, and competent to apprehend and avoid all the apparent and obvious hazards of such service. *American Nail Co. v. Connelly*, 8 Ind. App. 398; *Peterson v. New Pittsburg, etc., Co.*, 149 Ind. 260. From the foregoing authorities, two propositions are firmly established: (1) That appellant was not legally bound to furnish and have attached to the jointer used by appellee the guard described in the complaint and answers to interrogatories, and hence was not chargeable with actionable negligence in failing to furnish it; (2) that the danger incident to the use of the jointer was open and obvious, both to the appellant and the appellee alike, and hence the latter assumed the risk of injury resulting from its use.

We will now determine what antagonism or conflict there is, if any, between the general verdict and the special findings on the question of the alleged negligence of appellant to warn and advise appellee of the increased danger from the operation of the jointer while planing short, narrow, and thin pieces of lumber, as compared to larger and heavier pieces. By the general verdict it was determined that the danger was thus increased, and that appellant did not warn appellee thereof. It was also specially found that as the size of the timber that was to be planed on the jointer diminished, it was more liable to be violently jostled when coming in contact with the revolving knives; that appellee was ignorant thereof, that appellant knew such fact, and that the danger to the person operating the jointer was thereby correspond-

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ingly increased. It would seem, therefore, that upon this question the general verdict and special findings are in harmony. But when we look at and consider all the facts specially found, as we must, it seems to us that such apparent harmony is broken and transformed into irreconcilable discord. When we take the answers to the interrogatories as a whole, the fact is firmly established that the increased danger resulting from planing pieces of timber of the size and character appellee was planing when injured was apparent to the observation of an ordinarily intelligent person, and incident to the ordinary use of the jointer. And again it is evident from the special findings that the increased danger to appellee with his ordinary intelligence and his experience was open and obvious, and therefore the increased risk arising from the use of such pieces of timber was assumed by him. It is shown that different sizes of timber could be planed on this jointer. Appellee had planed pieces of different sizes. It is obvious to any person of ordinary intelligence, to say nothing of experience, that the nearer the workman gets his hands to the revolving knives, the danger is correspondingly increased. As the piece of timber diminishes in size, the hands of the operator, while pushing it over the knives, come proportionately nearer to them. This fact is open and obvious. A large and heavy piece of timber, while being pushed on the knives, would be steadier by reason of its own weight than a smaller and lighter one, and therefore not so liable to become violently jostled. A piece of timber might be so heavy that its weight and the law of gravitation operating upon it would hold it steadily to the revolving knives, without force from the operator. It was specially found that the first time a man uses the jointer, and immediately, he learns that the revolving knives offer resistance to the timber he is pushing over them, and that it is necessary for him to apply force to the timber, while so pushing it, to keep

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it in place. This is not only a fact specially found, but it is a law of natural philosophy. When an object comes in contact with another of increased power and motion, the one of the lesser power must give way to the one of greater strength.

In *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648, it is held that a person is bound to take ordinary observation of familiar laws, and to govern himself accordingly, and if he fail to do so the risk is his own.

Judge Cooley, in *Michigan Central R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, said: "The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it." And so, if a servant is operating a circular saw, it is no duty of the master to warn him that if any portion of his person comes in contact with it he will be injured. That is an open obvious fact and is patent to a person of ordinary intelligence. Under the facts, as they appear in this case, we can not believe that appellant owed appellee the duty of warning him of the danger incident to the service in which he was engaged. He had used the jointer every day and about fifteen times every week for three months. He had planed on it "head-blocks" from thirteen to eighteen inches long, and two and one-half inches thick by two to three inches wide. The piece he was planing when injured was about fourteen inches long and about two inches square. He had planed a piece of the same size immediately before the accident. The experience he had had in the use of the machine was sufficient to make him familiar with its operation, and he was bound to know that the danger to his hands increased as he was compelled to have them closer to the revolving knives, by reason of the diminished size of the timber. But there is still a more potent reason which absolves appellant from liability upon this branch

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of the case, and that is, the danger was a patent one, open and obvious, and by his experience appellee had, or might have had, by the exercise of his natural faculties, an equal knowledge thereof with appellant. *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; *Diamond Plate Glass Co. v. DeHORITY*, 143 Ind. 381; *Burns v. Windfall Mfg. Co.*, 146 Ind. 261; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Wolf v. Big Creek Stone Co.*, 148 Ind. 317; *Becker v. Baumgartner*, 5 Ind. App. 576; *Salem Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27; *Romona Co. v. Tate*, 12 Ind. App. 57; *Chicago, etc., R. Co. v. Wagner*, 17 Ind. App. 22; *East Chicago, etc., Co. v. Williams*, 17 Ind. App. 573; *East Chicago, etc., Co. v. Ankeny*, 19 Ind. App. 150. Much more might be said upon this branch of the case and many additional authorities cited, but it is useless. Under the authorities, we do not see how the general verdict and the special findings can be reconciled. The latter wholly fail to disclose any actionable negligence on the part of appellant. On the contrary, they show that he was without fault. The jointer used by appellee was the kind in general use in planing mills, etc.; it was in good repair; there were no defects in it; appellee had had experience in the use of it at least three months; he knew, or was bound to know, that it was a dangerous machine; he was a person of mature years and of average intelligence; he had had five years experience in working in hard wood; he knew there was no guard on the jointer, and he continued to use it without making any complaint or without a promise on the part of appellant to put a guard on it. Under these facts appellant is shown to be without fault, and that appellee assumes the risk incident to his employment. Our conclusion, therefore, is that the special findings establish facts which preclude appellee's right to recover, and hence there is such conflict and antagonism between the general verdict and answers to interrogatories that they can not be reconciled upon any

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reasonable hypothesis. In such case, the answers to interrogatories must control.

Appellant's motion for judgment should have been sustained. This conclusion makes it unnecessary to decide other questions presented by the record. The judgment is reversed, and the court below is directed to sustain appellant's motion for judgment in his favor notwithstanding the general verdict and render judgment accordingly.

STATE OF INDIANA v. HILGENDORF.

[No. 8,158. Filed November 1, 1899.]

TAXATION.—Failure to List Property for Taxation —Affidavit and Information.—Criminal Law.—An affidavit and information charging that defendant "being requested as required by law," failed to give a true list of his property for taxation is sufficient to charge the offense defined by §2271 Burns 1894 without setting out the exact manner in which the request to furnish a list of taxable property was made by the assessor.

From the Lake Circuit Court. *Reversed.*

W. L. Taylor, Attorney-General, *S. T. Sutton*, *J. O. Bowers* and *W. J. McAleer*, for State.

B. F. Ibach and *J. G. Ibach*, for appellee.

HENLEY, J.—It is objected to the sufficiency of the affidavit upon which the information is based that it charges no misdemeanor under the statute, and that there is an attempt to charge appellee in the same affidavit with the commission of several misdemeanors. The affidavit upon which the information is based, omitting the formal part, is as follows: "That on the 23rd day of April, 1898, in said county of Lake and State of Indiana, one William Hilgendorf, who was then and there over the age of twenty-two years, and of sound mind, and who was then and there and for more than two years prior thereto a resident and taxpayer of North

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township in said county, being then and there requested, as required by law, by William Emmel, who was then and there the duly elected, qualified, and acting assessor of said North township in said county, as such assessor, to give a true and complete list of all of his taxable property then and there owned by and in the possession of him the said Hilgendorf, and situate then and there in said township, on the 1st day of April of said year 1898, did then and there unlawfully fail, neglect, and refuse to give a true list of his said property, and did then and there give and furnish to said assessor as a true list of his said property the following list to wit:" Here follows the list as furnished by appellee. Continuing the affidavit charges: "Which list was not then and there a true list of all the taxable property then and there owned by said William Hilgendorf on said 1st day of April, 1898, he the said William Hilgendorf on said 1st day of April, 1898, having, and having had, then and there on said 1st day of April, 1898, owned, controlled, and in his possession, then and there situate, other taxable property not included in said list so furnished as aforesaid by said William Hilgendorf to said William Emmel as assessor, of said North township as aforesaid to wit: Thirteen head of cattle of the value of \$220; one female dog the tax upon which was then and there \$3; which said property was not then and there listed by said Hilgendorf for taxation to said Emmel as said assessor. Contrary to the form of the statute, etc."

The above affidavit is drawn under §2271 Burns 1894, which is as follows: "Whoever when requested by the assessor, state, county or municipal, or any of his deputies, fails to give a true list of all his taxable property, or to take and subscribe any oath in that behalf, as required by law, or shall fix a fraudulent value, where an oath is not required, on such property, upon conviction thereof, shall be fined," etc. The offense charged in the affidavit is a statutory one,

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being created and defined by the statute, and in such cases it is generally sufficient to charge the offense in the language of the statute, which was done in this case. *State v. Beach*, 147 Ind. 74, 36 L. R. A. 179; *Trout v. State*, 111 Ind. 499; *State v. Miller*, 98 Ind. 70; *Howard v. State*, 87 Ind. 68. It was not necessary to set out in the affidavit the exact manner in which the request to furnish a list of taxable property was made by the assessor.

In *Stribbling v. State*, 56 Ind. 79, the Supreme Court say: "The sufficiency or insufficiency of an indictment may be tested by the answer to the following question: Can the facts, properly alleged in the indictment, be true, and the defendant innocent of the offense intended to be charged against him? If the answer must be in the affirmative the indictment is bad; if in the negative the indictment is good."

If we apply this test to the affidavit in question we cannot help but conclude that it is good. If the facts properly alleged in the affidavit are true, appellee is guilty of the offense defined by the statute as charged against him in the affidavit. We think the words in the affidavit "as required by law" might be entirely omitted and the indictment still charge the offense intended under the statute. It cannot be contended that there is not sufficient matter alleged in the affidavit in question to indicate the crime and person charged. §1824 Burns 1894.

The lower court erred in sustaining the motion to quash the affidavit and information. The appeal of the State is therefore sustained at the cost of appellee.

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POPE v. BRANCH COUNTY SAVINGS BANK.

[No. 2,881. Filed November 2, 1899.]

INTERROGATORIES TO JURY. — *Practice.* — Each interrogatory propounded to the jury must present a single material fact involved in the issue. *p. 212.*

PLEADING. — *Answer.* — *Non Est Factum.* — *Bills and Notes.* — *Alteration of Note.* — *Instructions.* — Where a plea of *non est factum* was interposed in an action on a promissory note, and the evidence showed that a material alteration was made in the note after its execution, without the knowledge or consent of defendant, the court erred in instructing the jury that they should find for the plaintiff if it was shown by a preponderance of the evidence that defendant executed the note. *p. 213.*

BILLS AND NOTES. — *Non Est Factum.* — *Bona Fide Holder.* — *Burden of Proof.* — Where in a suit on a note by a bank as indorsee the defendant filed a plea of *non est factum*, and introduced evidence showing that a material alteration was made in the note after its execution, without the knowledge or consent of defendant, to warrant a recovery the burden rested upon plaintiff to show that it was a *bona fide* holder for value. *p. 213.*

SAME. — *Alteration of Note.* — *Instruction.* — An instruction in an action on a promissory note that if the note was signed and delivered with a blank space between the words "negotiable and payable at" and "bank" that the payee, or any indorsee thereof, had the right to insert the name of a bank was erroneous, where the evidence showed that the note was delivered with the understanding that it should not be payable in bank. *p. 214.*

SAME. — *Non Est Factum.* — *Alteration of Note.* — *Instruction.* — An instruction in an action on a promissory note that if the jury found that the note was delivered with the agreement that it was not to be payable at any bank, and that the payee inserted the name of a bank in a blank in the note before the word "bank," in violation of the agreement, and the note came to plaintiff in this condition, in the usual course of business, in good faith, for a valuable consideration, then you should find for plaintiff, because the note was regular upon its face when it bought it, is erroneous, as it was within the province of the jury to determine whether the note was regular upon its face. *pp. 215, 216.*

SAME. — *Alteration of Note.* — *Bona Fide Purchaser.* — *Instruction.* — Where defendant interposed the plea of *non est factum* to an action

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on a promissory note, on account of a change made in the note after its execution, an instruction that if the evidence showed that the note came to plaintiff, in the usual course of business, in good faith, for a valuable consideration, before maturity, that the jury should find for plaintiff was erroneous, as it is the duty of a purchaser of negotiable paper, before maturity, to make inquiry as to its genuineness if there is anything about the paper itself, or the circumstances surrounding its presentation for discount, calculated to excite suspicion in the mind of a reasonably cautious person. pp. 215-217.

INSTRUCTIONS.—*Abstract Propositions of Law.—Remedy.*—Available error cannot be predicated upon the action of the court in giving an instruction which was correct as an abstract proposition of law. The remedy in such cases is to request further instructions upon the proposition. p. 217.

EVIDENCE.—*Conclusion.—Bills and Notes.*—In an action on a promissory note it was error for the court to permit plaintiff to testify that he bought the note in good faith, as the question of good faith was one to be decided by the jury upon all the facts. pp. 217, 218.

From the Elkhart Circuit Court. *Reversed.*

John M. Van Fleet and *Vernon W. Van Fleet*, for appellant.

O. T. Chamberlain and *P. L. Turner*, for appellee.

COMSTOCK, C. J.—Appellee brought this action against appellant upon a promissory note alleged to have been executed by appellant to the order of Edwin A. Jones, who indorsed it in writing to Catherine Jones, who in turn indorsed it, before maturity, in writing to appellee. The note was for \$236.68, with interest and attorney's fees. Appellant answered by *non est factum*.

No question is made upon the complaint or answer. The cause was tried by jury and a verdict returned for appellee in the sum of \$263.40. With the general verdict answers to interrogatories were returned. The error assigned upon this appeal is the action of the court in overruling appellant's motion for a new trial.

It appears from the record that appellant and one Edwin

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A. Jones were formerly partners in business. Upon the dissolution of the partnership, appellant executed the note in suit to Jones for the balance supposed to be due him on account of obligations growing out of the partnership business. The note was subsequently assigned to the wife of Jones, and by her, as above stated, to appellee. Appellant claims that he refused to execute a note payable in bank; that the note he signed and delivered to Jones was "negotiable and payable at ——— Bank, Elkhart, Indiana," and that, after its execution, it was changed by writing before the word "Bank" the words "First National." This claim of appellant is sustained by the evidence.

The motion for a new trial contains ten reasons. Under the first and second, appellant complains of the verdict of the jury and the finding on the eighth interrogatory submitted to them. As our view of the law requires the reversal of the judgment, and as the questions presented by these reasons for a new trial may not arise upon a second trial, we do not pass upon them.

The refusal of the court to submit to the jury the sixth interrogatory asked by appellant is the third reason stated in the motion for a new trial. This interrogatory is in the following language: "It is true, is it not, that after said Edwin A. Jones had thus filled up said blank he, as agent of his wife, took said note to Coldwater, Michigan, and sold it to the plaintiff, and that at the time the plaintiff so purchased said note it clearly appeared that the words "First National" with which said blank was filled were in a handwriting different from that of the remainder of said notes?" This interrogatory called for several facts. It has been held by the Supreme Court that each interrogatory must present a single material fact involved in the issue. *Town of Albion v. Hetrick*, 90 Ind. 545, 548, 46 Am. Rep. 230; *Rosser v. Barnes*, 16 Ind. 502. Interrogatory number seven asked by appellant, and refused, is subject to the same objection.

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The fifth reason for a new trial questions the ruling of the court in giving to the jury the first instruction asked by the appellee. The instruction is in the following language: "This is an action by the plaintiff, the Branch Co. Savings Bank, against the defendant, upon a note, a copy of which is set out in the plaintiff's complaint. The only defense which the defendant pleads to this note is his sworn statement that he did not execute the note. The court instructs you that if a fair preponderance of the evidence satisfies your minds that the defendant did execute the note sued upon, then you should find for the plaintiff in the sum of the principal and interest of said note with a reasonable attorney's fee for the plaintiff's attorney." The defendant answered by a plea of *non est factum*. This answer raised the question of the alteration of the note. *Wiltfong v. Schafer*, 121 Ind. 264. Two material questions were in issue: (1) Was there a material alteration? (2) Was appellee a *bona fide* purchaser? The evidence shows that there was a material alteration after the execution of the note, without the knowledge or consent of appellant. There was, therefore, no execution of the note as sued upon. The burden then rested upon the appellee to show that it was a *bona fide* holder for value. *Giberson v. Jolley*, 120 Ind. 301; *Palmer v. Poor*, 121 Ind. 135; *National Bank v. Ruhl*, 122 Ind. 279; *Schmueckle v. Waters*, 125 Ind. 265; *Kain v. Bare*, 4 Ind. App. 440; *Bunting v. Mick*, 5 Ind. App. 289. The evidence shows that the blank was fraudulently filled by Jones after the execution of the note, and against the express agreement of the parties. The only question raised by this instruction was whether appellee could recover notwithstanding the alteration. The question as to the good faith of appellee was taken from the consideration of the jury. It was a material question, and its omission from the instruction was erroneous and was harmful to appellant.

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The second instruction given at the request of appellee, and excepted to, is as follows: "The defendant claims that the note sued upon has been changed since he signed it by some one having inserted the words 'First National' before the word 'Bank' in said note. In other words, his claim is that the note when signed by him read 'negotiable and payable at ——— Bank, Elkhart, Indiana.' That a space about two inches wide before the word bank had no writing in it at the time he signed the note, and that the words 'First National' have been inserted in said space after he signed it and delivered it to Edwin A. Jones. The court instructs you that if the defendant signed the note while the space in front of the word 'Bank' was vacant, and that the note at the time he signed it read 'negotiable and payable at ——— Bank, Elkhart, Indiana,' then the payee of the note, Edwin A. Jones, or any indorsee of the note had a right to insert in said blank the name of any bank in Elkhart, Indiana." This instruction, as does the first, takes from the consideration of the jury the question of good faith of the appellee. The undisputed evidence shows that after the execution of the note, and contrary to the express understanding of the parties, the blank was filled. A payee or indorsee having notice of the agreement of the parties can not materially alter a note contrary to the express agreement of the parties thereto. Counsel for appellee insist that this instruction was correct and is in accord with the principle announced in *Marshall v. Drescher*, 68 Ind. 359. In that case the note was executed with the words "payable at" with a blank space after those words. The court found that the maker of the note did not intend to give his note payable in bank; that after the note was executed, without the knowledge or consent of the maker, the payee inserted the words after "payable at", "The First National Bank at Spencer, Indiana," and before it was due sold and transferred it to Morris, who sold and

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transferred it to the plaintiff. It does not appear that the intention of the maker not to give his note payable in bank was communicated to the payee. The court said: "The payee had implied authority from the conditions of the note and from the statement of the maker to leave it at the First National Bank at Spencer for payment to fill up the blank in the note as he did. We think the finding shows that the note was valid in the hands of the payee notwithstanding the alteration, and being so valid, it was valid in the hands of the appellee whether he had notice of the alteration or not." There was no understanding that the note should not be payable in bank. The facts are widely different from those in the case at bar.

In *Palmer v. Poor*, 121 Ind., at page 137, the court in commenting upon *Marshall v. Drescher*, 68 Ind. 359, said: "The circumstances were such as to create the implication that the holder of the note had authority to fill the blank left in the instrument, and it was upon this ground that the note there under consideration was held valid. The case of *McCoy v. Lockwood*, 71 Ind. 319, asserts the doctrine that a material alteration will avoid a note even in the hands of a *bona fide* indorsee, refers to the cases of *Holland v. Hatch*, 11 Ind. 497, *Schnewind v. Hackett*, 54 Ind. 248, and *Collier v. Waugh*, 64 Ind. 456, with approval, and denies that a note in the hands of a *bona fide* holder is enforceable where it was altered by writing in it a place of payment."

The third instruction given at the request of appellee and excepted to is made the seventh reason for a new trial. It is as follows: "The court further instructs you that notwithstanding the fact that the defendant and Edwin A. Jones, the payee of the note, agreed that said note should not be payable at any bank, yet if the defendant signed the note, leaving the space in front of the word 'Bank' vacant, and

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in violation of said agreement said Edwin A. Jones before he sold said note wrote in the words 'First National' before the word 'Bank', and if the note in this condition came into the hands of the plaintiff in the usual course of their business, in good faith, for a valuable consideration, and before its maturity, they having bought it from Catherine Jones, one of the indorsees upon the back of said note without any knowledge of the agreement between said defendant and said Edwin A. Jones, then you should find for the plaintiff, because the note was regular upon its face when they bought it and they had a right to buy it in good faith as commercial paper, and the defendant, Pope, can not defend against the plaintiff by reason of the fact that the words 'First National' were written in said note, in violation of the agreement between him and said Edwin A. Jones, and without his knowledge and consent; and under such circumstances the defendant would be bound, and your verdict would be for the plaintiff." This instruction is open to the objection that it tells the jury that the note was regular upon its face. Whether the note was regular on its face was a question for the jury. Whether there was anything in its appearance sufficient to excite the suspicion of a reasonably cautious person was a question of fact to be determined by the jury. It is subject to the further objection that it tells the jury that unless appellee had actual knowledge of the agreement between the maker and payee, that the note should not be made payable in bank, the alteration claimed would not render the note invalid as to it.

The law as announced by the Supreme Court and this Court in this State, with reference to the purchase of negotiable paper before maturity, is that if there is anything about the paper itself, or the circumstances attending its presentation for discount, calculated to excite suspicion in the mind of a reasonably cautious person, it is the duty of

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the purchaser to make inquiry as to its genuineness; otherwise not. *Tescher v. Merea*, 118 Ind. 586; *Citizens Bank v. Leonhart*, 126 Ind. 206; *Hankey v. Downey*, 3 Ind. App. 325, 331; *Bank v. Berry*, 21 Ind. App. 261. We are intimating no opinion as to the significance of the fact that the note in question was in three different handwritings, or that it was negotiated at some distance from the place where payable. These were facts for the consideration of the jury.

The fifth instruction requested by appellee, and excepted to, informed the jury that "if one of two innocent people must suffer, the one must lose who put it in the power of another to fill up the blank and sell it to innocent purchasers." As an abstract proposition, this instruction correctly states the law. Appellant should have asked for further instruction upon the subject of negligence of the parties if he desired it.

The third instruction given by the court of its own motion was excepted to. It is as follows: "If you find the note sued upon in this case was drawn up with the words 'in a Bank at Elkhart, Ind.,' leaving a blank space before the word 'Bank' in said note, then the payee of the note would have had the legal right to add the words 'First National' before the word 'Bank', and if that is all he did, your verdict will be for the plaintiff. This he could do without committing forgery, with or without the consent of the maker." The payee had no right to fill up a blank in violation of an agreement between the parties, which materially alters the note, with notice of such agreement.

Another reason for a new trial discussed by appellant is the action of the court in permitting the witness C. T. Gillet, cashier of appellee, after he had testified that he had bought the note in suit for \$200, to answer the following question: "State whether or not you bought it in good faith?" To which question the witness answered, "We did." The question of good faith was one to be decided by the jury upon

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all the evidence. It called for a conclusion of law and not the statement of fact. *Bunting v. Mick*, 5 Ind. App. 289; *Scotten v. Randolph*, 96 Ind. 581.

The position of counsel for appellee upon the questions presented upon the instructions is that if A give to B a perfect negotiable note, B would have no right to interline or fill in other material inconsistent with the character of the paper for the purpose of making it a negotiable note governed by the law merchant; but if A executes to B a note not perfect, and not complete upon its face, with proper blanks to be filled, B may fill those blanks not inconsistent with the character of the paper. That in the case at bar, an imperfect negotiable note was executed "payable at _____ Bank, Elkhart, Indiana," and that the payee was thereby authorized to fill in the name of any bank in the town named, for the purpose of making the note a complete negotiable note governed by the law merchant, for the reason that the name of the bank filled in is not inconsistent with the character of the paper. With the rule for which appellee's counsel contend, we find no fault. Its reason is thus stated in §181, *Randolph on Commercial Paper* (ed. 1886.) "The leaving of blanks in a contract and the delivery of the instrument with such blanks create an agency in the receiver and his assigns to fill the blanks in the way agreed upon or contemplated by the maker. * * * The authority to fill a blank in such case is derived wholly, as will be seen, from the implied agency created by the maker's act in putting the paper into circulation." This right is given by an implied authority; but authority can not be implied to do that which it is agreed shall not be done. The law will not make a contract contrary to the express agreement of parties. Counsel for appellee contend that blanks may be filled with matter germane thereto in violation of an existing agreement to the contrary, and that the note will be valid in the hands

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of one having notice. We can not concur in this view of the law. In support of this proposition, counsel cite *DePauw v. Bank of Salem*, 126 Ind. 553. The opinion holding that when one signs a note in blank, or leaves blanks in it necessary to be filled out to make it a complete instrument, and delivers it in this condition, he clothes the holder with the implied authority to fill the blanks. It is said, at page 557 of the opinion: "And in such case, even if the blanks are filled in violation of the express understanding of the parties, he will be liable to an innocent holder, the note being negotiable." This falls far short of saying that the maker would be liable to a purchaser with notice. *Geddes v. Blackmore*, 132 Ind. 551, is also cited. William Winder signed a printed blank form of a promissory note, the date of the note, date of maturity, amount, name of payee, all being blank, and intrusted it to Geddes with verbal instructions to purchase hogs for a firm composed of William Winder and Asher Winder, to fill the blanks in the note, and deliver the same to persons from whom he purchased hogs, filling the date. The amount and name of the payee were to be filled by inserting the amount to be paid for the hogs and the names of the persons from whom the hogs were purchased. Geddes violated his instructions and used the note to borrow \$1,000 of appellee Blackmore, filling the blank amount at \$1,000 and the name of Blackmore as payee, and filled the other blanks. He signed the note himself as one of the payees, delivered the same to Blackmore, and received from him the \$1,000. Geddes purchased no hogs, and did not use any of the money for the purchase of hogs for William Winder or the firm of Winder and Winder, nor did William Winder receive any of the money. The use made of the note was unauthorized, and was without his knowledge, and contrary to his instructions. The court held that Winder was liable because he had placed in the

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power of Geddes to accomplish just what he did accomplish. It does not appear that Blackmore accepted the note with knowledge of the facts, nor is it claimed that there was anything in the appearance of the note to put him upon inquiry. Many cases are cited by counsel for appellee in line with the rule as stated by Randolph, *supra*, giving to the receiver of an instrument the implied authority to fill the blanks "in the way agreed upon or contemplated by the maker," but no cases are cited, and we know of none, authorizing the payee or indorsee of a note with notice to fill a blank in a promissory note in direct violation of the understanding and agreement of the parties thereto.

The judgment is reversed, with instruction to the trial court to sustain appellant's motion for a new trial.

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ECUTOR.

[No. 2,977. Filed November 2, 1899.]

INSURANCE.—Suit upon Oral Contract.—Pleading.—In a suit against an insurance company for a fire loss, upon an oral contract to insure the property, the policy agreed to be issued is not the foundation of the action in the sense that it must be filed with the complaint. *p. 222.*

SAME.—Oral Contract.—Principal and Agent.—Plaintiff brought suit for a loss by fire, upon an oral contract to insure. The facts found showed that defendant issued its policy upon the same property in favor of plaintiff's decedent and his partner; that upon the expiration of the policy, defendant's agent, who was authorized to receive applications for insurance and issue policies, called at decedent's place of business to talk about trading property, and decedent informed him that his insurance had expired and that he desired to have it renewed in the same company, for the same amount and upon the same terms as the former policy, except that it be made to him as sole owner, and the agent promised that he would attend to it immediately. Nothing was said as to the payment of the premium, the agent being indebted to decedent, and had on previous occasions issued policies to decedent and credited same on his account. The policy was not issued, and in ten days the property was de-

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stroyed by fire, of which the agent was verbally notified on the day of the fire, and a demand made for the policy and the premium therefor tendered, which was refused. *Held*, that a valid contract to insure was consummated and in force at the time of the fire, and that defendant was liable for the loss sustained. *pp.* 222-228.

INSURANCE.—Suit on Oral Contract.—Damages.—A court of equity will enforce an oral contract for a policy of fire insurance, and, having jurisdiction for specific enforcement, adjudge the damages the same as if the policy had been issued and suit brought thereon. *p.* 226.

SAME.—Crediting Premium on Agent's Account.—Where an insurance agent entered into a contract to insure plaintiff's property, crediting the premium on an account which the agent owed to plaintiff, the contract is binding on the company. *p.* 226.

SAME.—Complaint.—Payment of Premium.—In an action on an oral contract of insurance it is not necessary to allege and prove payment of the premium. *p.* 227.

EVIDENCE.—Deceased Witness.—The testimony of a deceased witness may be read as evidence in a subsequent trial. *p.* 229.

SAME.—Insurance.—Oral Contract.—In an action against an insurance company for a loss by fire, under a contract entered into with defendant's agent to insure the property for the same amount, and upon the same terms as a former policy issued by defendant upon the property, the former policy is admissible in evidence. *pp.* 229, 230.

INSURANCE.—Proofs of Loss.—Waiver.—Where an insurance company, after a loss, refused to issue a policy upon an oral agreement entered into by its agent to insure the property, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit. *p.* 230.

SAME.—Principal and Agent.—Premium.—An agent authorized to accept risks and collect premiums, having the power to make a valid contract to insure, may waive the payment of premium in cash. *p.* 230.

SAME.—Premium.—Payment.—Evidence.—Where parties contract for insurance with reference to former dealings in which a credit was given for premiums, such dealings may be looked to in determining whether a cash payment or a credit was intended. *p.* 230.

EVIDENCE.—Insurance.—Ownership of Insured Property.—In an action for a loss under a contract of insurance, evidence by a witness who had formerly owned an interest in the insured property, that she had no interest therein when it was burned, was harmless, where there was other undisputed evidence showing the ownership of the property. *p.* 231.

SAME.—Exception.—An objection to the admission of evidence on the ground that it was immaterial and irrelevant is not sufficient to raise any question as to its competency or admissibility. *p.* 231.

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From the Marion Superior Court. *Affirmed.*

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

W. N. Harding, A. R. Hovey and E. A. McAlpin, for appellee.

ROBINSON, J.—Appellee sues upon an oral contract to insure. The first paragraph of complaint, after showing location of property, ownership by insured at the time of the contract, and of the loss, the period and the amount of insurance and premium paid, avers that, on a date named, appellant agreed, through its agent, to deliver appellee's decedent within a reasonable time its policy of insurance upon the property, in a named amount, against loss and damage by fire; that while the agreement was in force the property burned; that immediately after the fire the agent was notified of the loss, and demand made on him for the execution and delivery of the policy, which demand and payment of the loss was refused. The second paragraph contains additional averments to the effect that at the time of the agreement to issue the policy the agent had policies of a certain form signed by appellant's president and secretary, and issued and delivered by appellant to the agent to be by him countersigned and delivered to persons insured; that by the terms of the policies issued by appellant in the usual form appellant promised to pay the loss sixty days after notice and proof of loss.

The complaint shows the parties to the contract, its subject-matter, an insurable interest, the duration of the risk, the amount insured, and premium paid. And it is averred that the company, through its agent, agreed to make and deliver to appellee's decedent, within a reasonable time, its policy of insurance. Nothing as to the terms and conditions of the contract were left open. They were all agreed upon. The policy agreed to be issued is not the foundation of the action, in the sense that it must be filed with the complaint. Thus in *New England Ins. Co. v. Robinson*, 25 Ind. 536, it

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is said: "The policy of insurance, which the company agreed to issue, was not the foundation of the action, and a copy thereof was not, under the code, required to be filed with the complaint. The company having refused to issue the policy, it was not necessary that the complaint should be special, and show the conditions complied with. *Tayloe v. Merchants Ins. Co.*, 9 How. 390, 18 Curtis 191. The conditions precedent were waived by the refusal of the company to issue the policy. *Post v. Aetna Ins. Co.*, 43 Barb. 351." See *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. 786; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371.

The facts found show that November 22, 1892, appellant issued its policy to George and Orme, partners, for one year for \$10.13 premium; that afterwards, and during the life of the policy, Orme sold her interest in the property, a stock of furniture, to George, who was thereafter and at the time of the fire the sole owner; that one Crawford, from prior to November 22, 1892, continuously until after the 2nd day of May, 1894, was appellant's agent, and was also agent of other fire insurance companies, and as such agent had entrusted to him by appellant blank policies of insurance signed by the company's officers, and as such agent was authorized to receive applications for insurance, and to accept risks, to write and countersign such policies, deliver them to the insured and collect the premiums; that on the 18th day of January, 1894, Crawford called at George's place of business, where the property burned was located, for business other than insuring his property, to talk about trading property, and while there George informed the agent that the insurance on his property had expired, and that he desired to have it renewed for the same amount and upon the same terms as in the former policy; that the agent in response to this request then promised George that he would attend to the matter of renewing the insurance immediately; that the agent knew the property belonged at that time to George; that George informed the agent that his insurance had expired in sub-

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stantially the following language: "My insurance is out. It is out now. I looked at the policy this morning;" that the agent then remarked, "Well, George, we don't want to burn out without any insurance; that must be attended to;" that George thereupon asked the agent which was the best company in his agency, and, being told by the agent that the Western Assurance Company was the best he had, George thereupon substantially said that that was the company he wanted; that the agent looked around at the stock of goods and asked George, substantially, how much insurance he wanted, and George thereupon told the agent that he wanted the same amount as had been carried in the old policy, just wanted the policy carried out, renewed; and thereupon the agent told George, in substance, that he would be out of town for a day or two, and that they would further talk of trading property when he returned; that when the request was made for insurance nothing was said as to the payment of the premium, but the agent had previous to that time issued to George two policies crediting at least one premium on account, not collecting the premium at the time of making the contract or at the time of issuing the policies, and the agent made no request that George should pay the premium for the policy he had requested, and a credit for the premium was contemplated by both parties, the agent being indebted to George for furniture; that the policy was not issued; that on the 28th day of January, 1894, the property was wholly destroyed by fire, of which the agent was verbally notified on the same day; that on February 3, 1894, George demanded of the agent the policy, which demand was not complied with; that on May 2, 1894, George tendered to the agent \$10.13 in payment of the premium and demanded the policy, which tender was refused as was also the policy; that on April 30, 1894, George served upon appellant a verified proof of loss, stating therein that the property destroyed was covered by renewed insurance in appellant company on renewal of the former policy; that

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during the pendency of the action George died, and appellee was appointed executor; that the loss has never been paid.

As conclusions of law the court stated that there was a contract of insurance between appellant and George, entered into January 18, 1894, which was in force at the time of the fire; that appellee is entitled to receive of appellant \$868, less \$10.13 which appellant should have on account of premium.

It is no doubt true that where there is simply an offer to insure, without acceptance, or where anything is left open for future adjustment as to amount or duration of risk, or as to premiums, no contract to insure exists. It must clearly appear that all the elements essential to a valid contract are agreed upon. There must be an offer and acceptance of a complete contract to insure. *Haskin v. Agricultural Ins. Co.*, 78 Va. 700; *McCann v. Aetna Ins. Co.*, 3 Neb. 198.

The question presented is whether a contract to insure was consummated between appellant, through its agent, and appellee's decedent on January 18, 1894. A contract of insurance may rest in parol. In *Eames v. Home Ins. Co.*, 94 U. S. 621, it is said: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties." *Hartford Ins. Co. v. King*, 106 Ala. 519, 17 South. 707.

The findings aside from the recitals of any mere evidence they may contain, show a contract to insure between appellant company's agent and appellee's decedent, and not simply a contract to issue a policy of insurance. The agent had authority to receive applications for insurance and accept risks. The findings show the parties making the contract and its subject-matter. The time when the risk should begin was fixed by the agent agreeing to attend to the matter

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of insurance immediately. The amount of the risk, its duration, and the premium, were fixed by the old policy which was issued by appellant and to which the attention of the agent was at the time expressly directed for information. *Home Ins. Co. v. Adler*, 71 Ala. 516. Both parties understood the kind of policy that was to be issued. Nothing remained to be determined afterwards. Had the agent written a policy, which he could have done on the information he had, and upon tendering it to the insured the payment of the premium had been refused, he could have collected it by suit.

It has been held that a court of equity will enforce an oral contract for a policy, and, having jurisdiction for specific enforcement, adjudge the damages just as if the policy had been issued and suit brought on it for the loss of the thing insured. And the effect is the same whether the suit is on the contract for the loss under the risk or for breach of the contract for not insuring, because the loss is the measure of damages. *Tayloe v. Merchants Ins. Co.*, 9 How. 390; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371. Wood on Fire Ins., §11.

It is further argued that the complaint avers that the premium was paid; that the findings show that the premium was not paid. The findings show that nothing was said as to the payment of the premium, that the agent did not demand it, that in previous dealings between the parties one premium had been credited on account, and that the parties contemplated a credit, the agent being indebted to the insured. As between the agent and the insured the finding shows the premium was in effect paid. Whether there was a payment to the company we need not decide, because if the finding is construed as showing a credit, the contract would be binding on the company. *Ohio Farmers Ins. Co. v. Stowman*, 16 Ind. App. 204.

If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins

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with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy. See Wood on Fire Ins., §20. *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82; *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush. 81; May on Ins., §22a.

A contract of insurance, or to insure, may exist without either the payment of the premium or delivery of the policy. *Union Central Ins. Co. v. Panly*, 8 Ind. App. 85, and cases there cited. *Bragdon v. Appleton Ins. Co.*, 42 Me. 259; *Kohne v. Insurance Co.*, 1 Wash. C. C. 93, Fed. Cas. No. 7,920.

An agent authorized to deliver policies and collect premiums may waive the payment of the premium in cash, notwithstanding a stipulation in the policy to the contrary, and such a policy is enforceable unless avoided by bad faith or collusion. *Phoenix Ins. Co. v. Hinesley*, 75 Ind. 1; *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Insurance Co. v. Colt*, 20 Wall. 560. See *Church v. LaFayette Ins. Co.*, 66 N. Y. 222; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97. Wood on Fire Ins., §28. As the agent was authorized to accept payment of premiums he could exercise his discretion as to the mode of payment. May on Ins., §134. Although the complaint avers payment, yet, in view of the above authorities, it was not a material averment, and it is sufficient if appellee established the substance of the issue without proving every averment of the complaint. It is immaterial whether the finding be construed as a payment of the premium by way of credit given the agent on his personal account or as a credit given the decedent by the agent. See Wood on Fire Ins., §30. *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276. Thus it is said a parol contract is valid, though nothing is said about the premium, where the parties from former dealings know the rate and the agent has been in the habit of giving credit. May on Ins., §22.

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In *Strohn v. Hartford Ins. Co.*, 37 Wis. 625, cited by appellant's counsel, it was held there was no complete contract of insurance because there was no definite agreement as to the duration of the risk.

In *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, and 3 N. W. 584, cited by appellant's counsel, the conversation which it was sought to construe as a contract to insure had reference entirely to the renewal of an existing policy. It was held that if there was to be simply a renewal of an existing policy the conditions precedent to the renewal must be performed before the policy took effect; that the parol contract was not a contract of insurance *in praesenti*, and contained no waiver of the conditions contained in the policy sought to be renewed. As the reasoning in that opinion, which was by a divided court, does not seem to be in harmony with the weight of authority we do not feel justified in following it.

Taking the finding as a whole we can not escape the conclusion that a valid contract to insure was consummated between appellant and appellee's decedent on January 18, 1894, which was in force when the property burned.

The first four reasons assigned for a new trial are based upon the failure of the evidence to sustain the findings. The court, in its finding, has set out the conversation constituting the contract to insure. Taking all the evidence given to show a contract to insure, and the inferences that may be legitimately drawn from the facts proved, we must conclude there is evidence to sustain the court's finding. There is evidence that the minds of the parties met upon the essential elements of the contract. None of the material details remained to be determined. Nothing was left open for future determination. If any of the essential elements were not expressly discussed and agreed upon, it is evident they were understood by the parties at the time. As has been said: "All the essentials need not, however, be expressly negotiated upon, since they may be understood, as where the terms of the usual

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policy are presumed to have been intended; or where the usual rate of premium is presumed to have been meant; or in case the duration of the risk is understood to be the same as in a former policy; or where by custom or usage a certain course of dealing has been established." Joyce on Ins., §46, *et seq.* See *Winne v. Niagara Ins. Co.*, 91 N. Y. 185; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Ruggles v. American Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Hartford Ins. Co. v. King*, 106 Ala. 519, 17 South. 707.

Upon some material questions the evidence is conflicting, but upon each there is some evidence, and the preponderance is a question for the trial court.

One of the grounds for a new trial was permitting appellee to read in evidence the longhand manuscript of the testimony of the original plaintiff, George, at a former trial of the case. The witness' death after the former, and before the present trial, was shown. The issues on the former trial, as shown by the pleadings introduced in evidence, were essentially the same as these at the present trial. In the two trials it was sought to recover on an oral contract to insure the same property in the same amount at the same rate, the only difference being that in the former complaint the date of the contract was fixed at on or about November, 1893, and in the present case the date is fixed in January, 1894. It is clear the witness testified then as to the same subject-matter in controversy now, and that the issue then tried was such as to challenge a full cross-examination respecting the right asserted now. It is well settled that the testimony of a deceased witness may be repeated at a subsequent trial. *Rooker v. Parsley*, 72 Ind. 497; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Horne v. Williams*, 23 Ind. 37, 1 Greenl. Ev. §164; *Gillette Ind. and Col. Ev.*, §188.

The admission of the old policy in evidence was not error. It is true that policy was issued to a firm, since dissolved, but appellee's decedent was a member of the firm. As the

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old policy was issued by appellant, was on the same property, and was referred to in the negotiations between the parties, it was admissible in evidence in aid of the agreement. *Home Ins. Co. v. Adler*, 71 Ala. 516.

Certain alleged proofs of loss were introduced in evidence, and the findings show that proofs of loss were made. Soon after the fire the company denied that any contract of insurance existed by refusing to issue a policy. When the company refused, upon request, after the loss, to issue a policy based upon the oral agreement, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit. The fire occurred January 28th, and on February 3rd following a demand was made for the policy, which was refused. This amounted to a denial of liability. This action of the company went to the foundation of the claim, and amounted to a denial of liability. *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 217; *Tayloe v. Merchants Ins. Co.*, 9 How. 390.

Where there is other undisputed evidence that a certain person was the owner of certain personal property on a date named, it is harmless error to permit a witness to state who the owner was in answer to a direct question to that end. Admitting the answer to be a conclusion, the error is not reversible error under such circumstances.

An agent authorized to accept risks and collect premiums, having the power to make a valid parol contract to insure, may waive the payment of the premium in cash. And where the parties contract with reference to provisions of previous dealings, the terms of such dealings may be shown in order to arrive at the intention of the parties. And where in previous dealings a credit was given for premiums, such dealings could be looked to in determining whether a cash payment or a credit was intended. *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Wood on Fire Ins.* §28. But, as before said, the payment of the premium is not a precedent condition to a valid oral contract to insure.

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A witness called had formerly been a partner of appellee's decedent, and a line of goods like those in controversy were owned by the firm. The firm had dissolved, and decedent had purchased witness' interest. An answer by the witness that she had no interest in the goods when burned would not tend to prove title in decedent. But as there was evidence showing that the decedent was the owner when the goods were burned, a negative answer by the witness that she had no interest in them at that time could work no harm to appellant.

A witness, the company's adjuster, testified, over objection, that the old policy issued to the firm, and which was shown the witness, was the form of policy the company issued to its agents, so far as the printed matter and signatures of the officers were concerned. Practically the same question was asked the agent with whom the negotiations to insure were had. Objection was made to this evidence as "immaterial" and as "irrelevant and immaterial." It has often been held that such objections are not sufficient to raise any question as to the competency or admissibility of evidence. *State v. Hughes*, 19 Ind. App. 266. *Miller v. Dill*, 149 Ind. 326. Judgment affirmed.

Henley, J., dissents.

CITY OF BEDFORD v. WOODY.

[No. 2,846. Filed May 18, 1899. Rehearing denied November 2, 1899.]

NEGLIGENCE.—Pleading.—Contributory Negligence.—Municipal Corporations.—Defective Sidewalk.—A general allegation of freedom from fault in a complaint for damages for a personal injury caused by a fall upon a defective sidewalk is not overcome by facts pleaded showing that the condition of the sidewalk was such that its defects could be observed by persons passing over it; as plaintiff was not required to forego travel upon it, and the degree of care used was a question for the jury. pp. 232, 233.

SAME.—Notice.—Instructions.—Municipal Corporations.—Defective Sidewalk.—Available error cannot be predicated upon the action of the court in instructing the jury, in an action against a city for

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damages arising from a defective sidewalk, to the effect that the notice of the defect, to be effective, might be to all or any of the city officers, where no attempt was made to prove actual notice, but the question was determined wholly from proof of constructive notice. *pp. 233, 234.*

JUDICIAL NOTICE.—*Incorporation of Cities.*—Courts take judicial notice of the incorporation of cities in this State. *p. 235.*

From the Lawrence Circuit Court. *Affirmed.*

Thomas J. Brooks, William F. Brooks and H. P. Pearson, for appellant.

J. E. Boruff, C. C. Matson and Joseph Giles, for appellee.

HENLEY, J.—This is an action for damages for an injury alleged to have been caused to appellee by a fall upon a defective sidewalk in the city of Bedford. Appellant's demurrer to the complaint for want of sufficient facts was overruled. There was an answer filed in general denial, a trial by jury, and verdict and judgment in favor of appellee.

Appellant has assigned as error the action of the lower court in overruling the demurrer to the complaint, the overruling of the motion for a new trial, and the overruling of appellant's motion for judgment in its favor on the special findings of the jury, notwithstanding the general verdict. It is the contention of counsel for appellant that the complaint is insufficient because the facts pleaded show appellee guilty of contributory negligence. The law is well settled that if the facts specially pleaded show the plaintiff to have been guilty of contributory negligence, such facts will overcome the general allegation of freedom from fault. It is the specific allegation of facts that controls in the construction of pleadings. *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 27; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Pennsylvania Co. v. Marion*, 104 Ind. 239. We do not think the facts pleaded show that appellee knew of the condition of the sidewalk. It is averred in the complaint that appellee had never before passed over the sidewalk upon which she fell and received the injury complained of. If the allegations of the

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complaint show that the condition of the sidewalk was such that its defects could be observed by persons passing over it, still appellee was not compelled to forego traveling upon it; her duty, if she had knowledge of the danger in so doing, was to use care in proportion to the known danger, and the degree of care used is a question for the jury. *Board, etc., v. Nichols*, 139 Ind. 611; *Town of Salem v. Walker*, 16 Ind. App. 687; *Board, etc., v. Castetter*, 7 Ind. App. 309; *Henry Co., etc., Co. v. Jackson*, 86 Ind. 111, 44 Am. Rep. 274; *City of Huntington v. Burke*, 21 Ind. App. 655; *City of Huntingburgh v. First*, 22 Ind. App. 66. We think the complaint stated a cause of action against appellant.

In discussing the motion for a new trial, the overruling of which is assigned as error, counsel for appellant complain of the fifth, sixth, and eleventh instructions given to the jury. These instructions were upon the question of notice to the city of the defective condition of the sidewalk. The fifth instruction presents the question and is as follows: "The jury are instructed that, in this case, there can be no liability on the part of the defendant, unless there was a neglect of duty in respect to the repairing of the sidewalks on the part of the officers of the city, and there can be no such neglect of duty, unless the jury find from the evidence that the officers of the city knew of the defects in the sidewalk complained of, or might with reasonable diligence have known of it, long enough before the accident occurred to have it repaired. The jury are instructed that when a party without the consent of the authorities of an incorporated city tear up and leave in a dangerous condition the sidewalk in said city, or place dangerous structures thereon or adjacent thereto, and a person is thereby injured, the city will not be liable for such injury, unless the authorities have actual notice of the dangerous condition of said sidewalk, or that it has remained in such a dangerous condition for a sufficient time so that in the exercise of ordinary care and diligence they ought to have notice

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of the dangerous condition of said sidewalk." Appellant contends that by this instruction the court informed the jury, in effect, that the notice of the defect to be effective might be to all, or any, of the city officers. The instruction is subject to the objection urged against it. In other respects the law is correctly stated therein.

The same objection obtains to instructions numbered six and eleven. But appellant fails to show wherein it is harmed by the giving of said instructions; upon the other hand the record affirmatively shows that appellant was not harmed thereby. Appellee did not attempt to prove actual notice of the defective condition of the walk, but the evidence abundantly showed constructive notice upon the part of the appellant, and the answers to the interrogatories returned with the general verdict show that in so far as notice entered into the making of the verdict the jury determined the question wholly from the proof of constructive notice.

It was not error under the issues in this case to instruct the jury, as was done by the court, by instruction numbered three, "that appellant is a municipal corporation." *Town of Thorntown v. Fugate*, 21 Ind. App. 537. Instruction numbered nine is not subject to the objection made to it by appellants' counsel.

The evidence in this case is conflicting. There is much evidence in the record going to sustain every material allegation of appellee's complaint; it comes to us unimpeached and with the indorsement of the trial court upon it, evidenced by its action in overruling the motion for a new trial.

We find no reversible error in the record. Judgment affirmed.

City of Hammond v. Meyers.

CITY OF HAMMOND v. MEYERS.

[No. 2,887. Filed November 8, 1899.]

PLEADING.—Complaint.—Motion to Make More Specific.—Practice.—

A complaint will not be held bad on an assignment that it does not state facts sufficient to constitute a cause of action, where the defects could have been reached by a motion to make more specific.

From the Lake Superior Court. *Affirmed.*

N. L. Agnew, D. E. Kelly, B. Borders and L. Becker,
for appellant.

W. A. Burritt, T. E. Bell, F. W. Burritt, J. W. Wartman and B. H. Miller, for appellee.

HENLEY, J.—In this case the assignment of error presents to the court one question: Does the complaint state facts sufficient to constitute a cause of action? The complaint in this case contains an allegation showing a duty owing by the appellant to appellee, an averment that appellant failed to perform that duty, and that the failure to perform such duty was the natural and proximate cause of the damage sustained by appellee. These three necessary averments are fairly deducible from the lengthy and disjointed statements of facts contained in appellee's complaint. It also appears from the complaint that appellant is a corporation; that appellee was damaged because of a defective street and sidewalk constructed by appellant, and of which defect appellant had reasonable notice, and that appellee was himself without fault.

We find the objections to the complaint pointed out by the counsel for appellant are, in each instance, that some material averment is not sufficiently definite, positive, or specific. We think every objection made by appellant to the complaint could have been remedied by a motion to make more specific, and this would have been the proper practice. *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334; *Jones v. State*, 112 Ind. 193; *Cleveland, etc., R. Co. v. Wynant*, 119 Ind. 539. Judgment affirmed.

State v. Rosenbaum.

STATE OF INDIANA v. ROSENBAUM.

[No. 8,057. Filed November 3, 1899.]

INTOXICATING LIQUORS.—*Saloon.—Occupants During Unlawful Hours.*

—*Former Acquittal.*—A saloon-keeper who permits two or more persons to enter his saloon during prohibited hours cannot be prosecuted for a separate offense as to each of such persons under §5323c Horner 1897 making it unlawful for the proprietor of such place to permit "any person or persons other than himself and family to go into such room" during prohibited hours.

From the Jasper Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley and A. E. Chizum, for State.

F. Foltz, C. G. Spitler and H. R. Kurrie, for appellee.

ROBINSON, J.—Appellee was indicted for permitting a person named to be and remain in his place of business during prohibited hours, contrary to the provisions of §3 of the act of March 11, 1895 (Acts 1895 p. 248).

Appellee pleaded in abatement, setting up a former indictment and acquittal, that the person named in the present indictment as having been in the saloon was in company with the person named in the former indictment, and that the acts complained of in the present indictment are identical with those complained of in the former indictment of which he had been acquitted. A demurrer to this plea was overruled, and upon this ruling the appeal is based.

The question presented is, can the proprietor of a place where liquors are sold, who permits two or more persons at the same time to be in the room during prohibited hours, be prosecuted for a separate offense as to each of such persons? The Attorney-General, in his brief, states that he is of the opinion that the question must be answered in the negative.

In *Smith v. State*, 85 Ind. 553, the court said: "The true test to determine the sufficiency or insufficiency of a plea

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of former acquittal as a bar to the pending prosecution is this: Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would be, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient."

The case of *State v. Eider*, 65 Ind. 282, 32 Am. Rep. 69, states the following rule: "When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing any other part of the articles, stolen by the same act." See, also, *State v. Gapen*, 17 Ind. App. 524; *Davidson v. State*, 99 Ind. 366; *Fritz v. State*, 40 Ind. 18; *Wininger v. State*, 13 Ind. 540; *Brinkman v. State*, 57 Ind. 76.

The statute makes it unlawful for the proprietor to permit "any person or persons other than himself and family" to go into the room at prohibited times. In the case at bar the crime committed was permitting "persons other than himself to go into such room" during prohibited hours. It was a single offense which can not be split up and prosecuted in parts. "A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." *Laupher v. State*, 14 Ind. 327. The appeal is not sustained.

HOLT v. SWEETZER.

[No. 2,895. Filed November 14, 1899.]

BILLS AND NOTES.—Corporations.—Notes Signed by Officers.—Liability of Parties.—Answer.—Parol Evidence.—In an action on a promissory note by the indorsee it appeared by the note that defendant was payee in the body thereof, that the note was signed by a corporation, and by defendant and another, their signatures being followed by "Pres." and "Secy.," respectively. Credits amounting

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to \$8,500 were indorsed on the note, and the note was afterward transferred by defendant by indorsement, without recourse. Defendant answered that the note was given by the corporation for money advanced to it by him, and that the signatures of the president and the secretary were intended to bind the corporation only, all of which was known by his indorsee; that said indorsee afterward assigned the note to plaintiff who also had full notice and knowledge of the facts alleged, and that after defendant assigned the note the corporation paid the interest which was credited thereon by the first indorsee. *Held*, that the answer was sufficient to authorize the admission of parol testimony to determine the liability of the parties.

From the Clay Circuit Court. *Reversed*.

A. G. Smith and *C. A. Korbly*, for appellant.

A. W. Knight, for appellee.

HENLEY, J.—Action by appellee against appellant upon a note, of which the following is a copy:

“\$4,995. Brazil, Ind., April 21, 1895. On demand, after date, we, or either of us, promise to pay to the order of Sterling R. Holt, negotiable and payable at the First National Bank of Brazil, Indiana, four thousand nine hundred and ninety-five dollars, with eight per cent. interest and attorneys fees, without any relief whatever from valuation or appraisement laws. The drawers and indorsers, severally, waive presentment for payment, protest, and notice of protest, and non-payment of this note. Brazil Ice and Cold Storage Co., Henry Bynum, Sec’y. Sterling R. Holt, Pres.”

And at the time said action was commenced the said note had written upon the back thereof the following: “Paid cash, May 4, ’96, \$500; paid cash, June 18, ’96, \$500; paid cash, July 18, ’96, \$500; paid cash, Aug. 10, ’96, \$500; paid cash, Aug. 20, ’96, \$500; paid cash, Aug. 27, ’96, \$500; paid cash, Sept. 29, ’96, \$500.

March 1, 1897, pay to F. M. Chapin or order, without recourse on me in law or equity. Sterling R. Holt.”

“Paid July 14, ’96 (97) \$243.98 interest up to July 14, 1897. Frederick M. Chapin.” “Frederick M. Chapin.”

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It is averred in the complaint that on the 21st day of April, 1895, the said Brazil Ice and Cold Storage Company, Henry Bynum and Sterling R. Holt, by their joint and several promissory note, promised to pay on demand after said date to the order of Sterling R. Holt said sum of \$4,995; that on the 1st day of March, 1897, the said Holt indorsed said note without recourse on him to one F. M. Chapin, who afterward indorsed the note to appellee, who was at the commencement of the action the owner and holder thereof.

A demurrer was filed to the complaint by appellant, but is omitted from the record. Appellant answered in three paragraphs. The third paragraph of answer alleged, in substance, as follows: That the note sued on was made by the Brazil Ice and Cold Storage Company to said appellant in consideration of the payment by appellant of a certain promissory note made by said company to one P. D. C. Ball, of St. Louis, which note was for the sum of \$4,995, to secure part of the unpaid purchase-money for an ice machine. That the note sued on was for a like amount, payable in bank, and was signed as follows: Brazil Ice and Cold Storage Co., Henry R. Bynum, Sec. Sterling R. Holt, Pres., and was so signed as secretary and president, respectively, of said company. That said company was a manufacturing corporation for manufacturing ice and cold storage; that it was lawfully indebted to said Ball for said sum for ice machinery, and by resolution of the board of directors of said corporation the note in suit was given to appellant for the cash advanced by him to said Ball, for said corporation, at its request. That said note was executed in the year 1896, and was dated 1897 by mistake. That there was no other or different consideration for the note sued on than the payment by appellant of said Ball note at the request of and for the benefit of the Brazil Ice and Cold Storage Company, and the note sued on represented a debt from said company to said appellant, and to no one else. That appellant afterward indorsed the note sued on to said Chapin, without recourse on appel-

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lant in law or equity. That said Chapin was fully notified that said note was given for the said debt of said corporation to said appellant, and that the signatures of said appellant and Bynum, on said note, were the signatures of the secretary and president of said corporation, authorized by its board of directors, and were intended to bind the corporation only. That said Chapin afterward indorsed said note to plaintiff Sweetzer with full notice that appellant was not liable on said note as maker, or otherwise, and that said note was one from said company to said appellant, for a debt owed by it to him, and that there was no consideration whatever to bind appellant as maker, surety, or otherwise; and that said note was long overdue and dishonored at the time of said indorsement thereof to said plaintiff. That whilst he was still the holder of the note sued on, appellant presented the same for payment to said Brazil Ice and Cold Storage Company, and that said company made seven partial payments of \$500 each between May 2nd and September 29, 1896, and that said payments were by him indorsed on the back of said note. That afterward, after the said note had been indorsed, the said company paid to said Chapin, by way of interest on said note, to July 14, 1897, the sum of \$243.98, which said Chapin indorsed on said note. That long before the appellee became the holder of the note sued on, said Chapin sold and indorsed to appellee a note purporting to have been executed by the said corporation, by said Chapin, its president, and said Bynum, its secretary, to said Chapin (payee), or order, for \$1,500; that said note was not at that time due; that said note was in fact a forgery, and that in order to secure said Sweetzer against loss on account of said forged note, Sweetzer procured from Chapin the indorsement and delivery of the note in suit, and surrendered to Chapin said forged note, a short time, to wit, two days before this suit was commenced. At the time the note sued on was indorsed by Chapin to Sweetzer, Sweetzer knew that the note sued on had been dishonored by the Brazil Ice

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and Cold Storage Company, and that the company was embarrassed, if not insolvent; that its property was in the hands of a receiver, and that the note had been given to appellant by the Brazil Ice and Cold Storage Company for the consideration aforesaid.

The second paragraph of appellant's answer was like the third, except that it did not set up the insolvency of the said corporation, nor the payment of the interest on said note to said Chapin, nor the sale by said Chapin of said forged note to plaintiff, as a consequence of which plaintiff caused said Chapin to assign to him the note sued on.

The first paragraph of said appellant's answer was in all material respects like the second, except that no actual notice on the part of appellee of the fact that the note was the note of the corporation is averred; neither is the allegation made that appellee had notice of the dishonor of the paper, but it is alleged that the letters "Pres." following appellant's signature, his restricted indorsement, were sufficient to put appellee, a purchaser, upon inquiry as to the facts and circumstances attending the execution of the note in suit. Appellant also filed a cross-complaint in two paragraphs.

The errors assigned call in question the rulings of the lower court in sustaining appellee's demurrer to the first, second, and third paragraphs of answer, and to the first and second paragraphs of appellant's cross-complaint.

There is a long line of decisions in this State holding that where a note is signed by a person with such words as "Trustee", "President", "Secretary", "Manager", immediately following the name, such words are, in the absence of a corporate seal upon the note, or an apparent intention in the body of the instrument, to bind the corporation alone, considered merely as descriptive of the person of the maker, and the note is held to be the obligation of the person so signing it. Another exception to this rule is where it is apparent from the manner of its signature that the parties signing the note intended that the note should bind the

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corporation alone. Still another exception is where the meaning of the instrument is uncertain, and the liability of the parties cannot be definitely determined upon its face; and in such a case as the one last mentioned, parol evidence may, under proper averments, be introduced to determine the rights and liabilities of the parties to the contract. *Prescott v. Hixon*, 22 Ind. App. 139; *Swartz v. Cohen*, 11 Ind. App. 20; *Metcalf v. Williams*, 104 U. S. 93; *Armstrong v. Kirkpatrick*, 79 Ind. 527; *Pearse v. Welborn*, 42 Ind. 331; *Means v. Swarmstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Gaff v. Theis*, 33 Ind. 307; *Liebscher v. Kraus*, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496; *Carpenter v. Farnsworth*, 106 Mass. 561; Daniels on Negotiable Inst., §327; Parsons on Notes and Bills, 168; *Haile v. Peirce*, 32 Md. 327.

The only question before this court in the case of *Albany Furniture Co. v. Bank*, 17 Ind. App. 531, was as to the sufficiency of the complaint, and it was in that case held that "Construing the complaint and exhibit together, we see no ambiguity. It is alleged to be the joint note of the parties signing it, and the exhibit is not inconsistent with that allegation." In the last mentioned case, the exceptions to the general rule, as herein stated, were expressly recognized.

The note sued on in the case at bar falls fairly within that class of instruments, the meaning of which is uncertain, and the liability of the parties thereto cannot be definitely determined upon the face of the instrument itself. It is certain that so long as the note remained in the hands of Sterling R. Holt, appellant, it was not his obligation; he was not a maker of the note, he was the payee, and, during the time it so remained in his possession, the Brazil Ice and Cold Storage Company paid to him seven payments of \$500 each. It was said in the case of *Pickering v. Cording*, 92 Ind. 306, 308, 47 Am. Rep. 145: "When an instrument in the form of a promissory note negotiable by the law merchant is made payable to the order of the maker himself, it is incomplete;

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indeed, it is a nullity, until it has been indorsed by the maker. A promissory note must have a maker, and it must have a payee who is another person than the maker." Further on in said opinion, the court say: "The maker of such a note does not become, by his indorsement, an 'indorser' in the technical sense of the term. An indorsement of a promissory note, in the ordinary technical meaning of the word, is an act which transfers the instrument already perfected in the hands of the indorser to another person, certain well defined liabilities attaching to the indorser dependent upon certain conditions. The maker of a note, payable to his own order, by a like act completes the note, makes the order upon which his liability depends, and his liability is that of a maker. That he may be held to such liability, there must be such writing upon the note as can be construed to be such an order."

When the appellant indorsed the note in suit with the restricted indorsement, "without recourse on me either in law or equity," he did not become a maker of the note. His indorsement was not such as could be construed to be such an order. The note in the hands of appellant was the note of the Brazil Ice and Cold Storage Company; it was payable to appellant, he being designated as payee in the body of the note; in the signature appellant added to his name the designation "Pres.", and these facts alone are sufficient to render the note ambiguous and make the liability of the parties to the instrument indefinite and uncertain, and to a great extent rebuts the presumption that appellant added the word "Pres." after his name merely as *descriptio personae*. Taking the note as it was when it went into the hands of appellee, with the appellant as payee in the body of the note, with the word "Pres." following his signature below the name of the Brazil Ice and Cold Storage Company, with credits thereon to the amount of \$3,500, paid by the Brazil Ice and Cold Storage Company, to appellant, with his restricted indorsement thereon, it is as fair to presume that

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the note was the note of the company as it is to presume that it was the joint note of the company, the appellant, and Bynum. In such a case parol testimony, under proper averments, is admissible, not to vary the terms of the contract, but to determine the rights and liabilities of the parties thereto. It is not the intention of this court to mitigate the rigorous rule prevailing in this State in cases of this class where no uncertainty or ambiguity exists; but where it appears, either in the body of the note or from the signature, that it was the intention of the parties to bind the corporation alone, or such an uncertainty exists as to render the note or other instrument ambiguous, it is the duty of the court to allow evidence to be introduced so that the rights of the parties may be rightfully determined.

Mr. Thompson, in his work on corporations, 4th Vol. §5127, says: "We find here, as in the case of sealed instruments, an irreconcilable confusion in the judicial holdings,—some of them, and especially those of early date, holding instruments which were plainly intended to be the promissory note of the corporation, to be merely the notes or obligations of the agent executing them, unless there was, not only in the body of the instrument, but also in the mode of its signature, a clear expression of the fact that it was the act of the corporation. In more recent cases, the judges have been mentally more honest, and have given effect to such instruments as the instrument of the corporation, where there were words, either in the body of the instrument or in the signature thereto which was plainly consistent with that conclusion and no other. In other words, here, as in the case of sealed instruments, many of the judges have at last come to the conclusion that it is their duty to interpret instruments, often executed by unskilled persons, so as to give effect to the real intention of the parties, as manifested on the face of the instrument,—proceeding upon the view that a judge can not believe one thing as a man, from the reading of an instrument under his eyes, and then pretend to believe a different thing as a judge."

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The averments of each paragraph of appellant's answer were sufficient upon which the lower court ought to have permitted parol testimony tending to fix the liability of the parties to the instrument. It is not necessary that we consider the errors alleged and predicated upon rulings on the cross-complaint filed by appellant. The judgment of the lower court is reversed, and the cause is remanded with instructions to overrule appellee's demurrer to the first, second, and third paragraphs of appellant's answer, and for further proceedings not inconsistent with this opinion.

LOUCKS v. TAYLOR.

[No. 3,165. Filed November 14, 1899.]

VENDOR AND PURCHASER.—*Fraud.*—Where a vendor in negotiating a sale of real estate falsely represented to the purchaser that a certain mortgage thereon in favor of a building and loan association had all been repaid except \$500, which was payable in monthly instalments of \$13.47; that the association had represented to vendor that the loan would be fully repaid in seventy-two instalments, and that only thirty-six instalments remained to be paid, when in fact the association represented to him that the stock would not mature in less than eighty-four months, such representation was not the statement of an opinion, but of a fact on which the purchaser had the right to rely. *pp. 246-249.*

SAME.—*Fraud.—Deeds.—Failure to Read Clause in Deed.*—Where the purchaser of real estate encumbered by a mortgage could not read because of defective eyesight, was inexperienced in business, and wholly unacquainted with the forms of deeds and contracts, but had confidence in the vendor, who upon reading the deed to him failed to read a clause therein stating that grantee assumed and agreed to pay a certain mortgage, when in fact the purchaser had only agreed to pay a certain balance represented by vendor to be due thereon, such failure was a fraud upon the purchaser. *pp. 246-249.*

From the Porter Circuit Court. *Affirmed.*

J. W. Wartman and B. H. Miller, for appellant.

N. L. Agnew, D. E. Kelly, B. Borders, L. Becker and J. O. Bowers, for appellee.

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COMSTOCK, C. J.—This action was to recover damages for false and fraudulent representations alleged to have been made by appellant in the sale to appellee of certain real estate in Lake county, Indiana. The action was begun in the Lake Circuit Court, but was tried in the Porter Circuit Court upon change of venue. Appellee recovered judgment for \$373. The only alleged error discussed is the sufficiency of the amended complaint on which the issues were formed and cause tried.

The complaint, in substance, alleges that on the 1st day of June, 1890, appellant, being the owner of certain real estate, in Lake county, Indiana, (describing it), borrowed of the Guaranty Savings & Loan Association of Minneapolis, Minnesota, \$800, and, to secure the payment of the same, purchased a certificate for eight shares of stock in said company, and agreed to mature them by the payment to said company of sixty cents each month upon each share, and until the stock was so matured he agreed to pay to the company interest upon the sum so borrowed, at the rate of thirteen per cent. per annum in monthly instalments of \$8.67 each; to secure the performance of the contract, he executed to the association a mortgage on said real estate, which was duly recorded in the proper record; the mortgage set out the contract between said company and Loucks in detail, but did not state the length of time required to mature by monthly payments of sixty cents per share. It did provide that appellant should continue to pay said sums per month, and continue to pay interest at the rate of thirteen per cent. per annum until the stock should mature, and upon the maturity of the stock it would be received by the company in full payment of the loan of \$800. At the time of the making of the contract between appellant and the company, the company represented to him that the stock would not mature in less than eighty-four months. On the 25th of February, 1893, appellant solicited appellee to purchase said property and offered to sell the same to him for \$1,800, and repre-

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sented to him that there was a mortgage on the property upon which there was a balance unpaid of \$500. Appellee agreed to purchase and pay for said property \$1,800.

It is alleged that for the purpose of cheating appellee, and to deceive him into paying more than \$1,800 for the property, appellant falsely and fraudulently represented to him that all the money borrowed had been paid except \$500, and that when appellee had paid to the association the sum of \$500 in monthly instalments of \$13.47 each the loan would be fully paid. Appellant further stated that the association had represented to him that the loan would be fully paid by the payment of seventy-two monthly instalments of \$13.47 each, and that he had paid thirty-six instalments, leaving only thirty-six unpaid; that all these representations were false; that appellant knew at the time he made them that they were false, and that he made them for the purpose of deceiving appellee and inducing him to pay a larger sum than \$1,800 for said property. He alleges that he believed said statements to be true; that he had no means to ascertain their truth except from said building association, which was located 500 miles from Lake county, Indiana. He paid \$700 in cash, and executed his four promissory notes for \$150, each due in one, two, three, and four years after date, secured by a mortgage on the property, and agreed to pay the association \$500 in monthly instalments of \$13.47 each. That, in furtherance of this fraudulent design, appellant caused to be inserted in the deed of conveyance this clause, to wit: "This conveyance is made subject to a certain mortgage in favor of the Guaranty Savings & Loan Association of Minneapolis, Minnesota, which the grantee assumes and agrees to pay off." That this clause was not according to the agreement, and that at the time appellee accepted the deed he did not know said clause was in the same, and had no knowledge of it until he had paid the price agreed upon; that he was more than sixty-five years of age; that his eyesight was so defective that he could not see to read the deed;

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that appellant pretended to read the deed to him, but did not read said clause to appellee, and concealed from him that it was in the deed. Appellee had had but little business experience; was wholly unacquainted with the forms of deeds and contracts; that appellant was a shrewd man, engaged in buying and selling property, well acquainted with the forms and technical meaning of all kinds of contracts, knew the technical meaning and force of said deed as it was written, and knew that appellee was ignorant of such matters and was unable to read said deed.

The complaint further avers that by tricks and devices, and pretended honesty and certain religious pretentions, appellant had obtained and then had the full confidence of appellee. The tricks and devices and religious pretentions were not set out, but it is clearly averred that appellant had the trust and confidence of appellee. He took possession of the property, paid the \$1,800 in the manner agreed upon, and when he had paid the \$500 to the association, he first learned that he had been deceived, and he was compelled to pay \$373 in addition to the \$500 which he agreed to pay.

Appellant points out that the controversy rests alone on the mortgage, or the balance of \$500 on the mortgage of \$800, and claims that there is no averment in the complaint that the representations made by appellant that the original mortgage was \$800 and the balance due on the same was \$500 was false or fraudulent. Appellant further claims that the complaint contains no averment that there was at the time of the purchase of the property more of balance due on the mortgage. There is no denial that \$500 would have paid the balance of the mortgage on the 25th of February, 1893; that if \$500 would have satisfied the mortgage on February 25, 1893, then the complaint states no cause of action.

Referring to the summary of the complaint above set out, we find that appellant represented that all of the loan had been repaid except \$500, payable in monthly instalments

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of \$13.47; that the association had represented to appellant that the loan would be fully paid in seventy-two monthly instalments of \$13.47 each; that he had paid thirty-six instalments, and that only thirty-six instalments remained to be paid; that all said statements and representations were false, and known by appellant to be false when he made them; that, at the time of the making of the contract with appellant, the company represented to him that the stock would not mature in less than eighty-four months. The complaint avers that all these representations were false. The statement which appellant made as made by the association was not an opinion, nor a conclusion. It was the statement of a fact about which appellant claimed to have knowledge; a statement of the amount necessary to discharge the lien; a statement of a substantive fact from the association that \$500 in monthly payments of \$13.47 would pay the balance of the mortgage indebtedness which appellee assumed. It was the statement of a fact upon which appellee had the right to rely. *Kramer v. Williamson*, 135 Ind. 655. It is not a satisfactory answer that the \$13.47 in thirty-six monthly payments would amount to only \$484.82, and would not, therefore, pay an indebtedness of \$500. Appellee could not read by reason of his defective eyesight, and was inexperienced in business. He had faith in appellant, and by reason of the representations made had the right to believe that the real estate he purchased would cost him, in the manner of payment agreed upon, not more than \$1,800.

The failure to read the clause in the deed assuming the payment of the balance of the mortgage was a fraud upon appellee by which he was made to assume an obligation greater than it was his purpose to assume, as was known to appellant. The judgment is affirmed.

Northwestern, etc., Assn. v. McPherson.

THE NORTHWESTERN LOAN AND INVESTMENT ASSOCIATION v. MCPHERSON ET AL.

[No. 2,854. Filed June 7, 1899. Rehearing denied Nov. 14, 1899.]

MECHANICS' LIENS.—Foreclosure.—Parties.—Section 5299 Horner 1897, relative to the foreclosure of mechanics' liens, does not authorize a joinder of plaintiffs whose claims and interests are several, but since the statute authorizes the consolidation of such actions by the court, available error cannot be predicated upon the action of the court in overruling a demurrer to a complaint in which several mechanics and material men joined, where the claims were stated severally, and the finding and judgment were several as to each claimant. pp. 251, 252.

SAME.—Failure to Record Notice of Lien.—Intervening Mortgage.—Where notice of intention to hold a lien is filed by a mechanic or material man as provided by law, the failure of the recorder to record it in the miscellaneous record, as required by §5296 Horner 1897, will not defeat the priority of the lien as against the holder of an intervening mortgage. pp. 252-254.

SAME.—Mortgages.—Priority.—Mechanics' liens relate back to the time when the work was commenced, or the materials were begun to be furnished, and a mortgage does not gain priority over a lien by reason of the fact that it was executed and recorded prior to the filing of the notice of the mechanic's lien. p. 254.

SAME.—Complaint.—Special Finding.—Description of Real Estate.—Variance.—A complaint in an action to foreclose a mechanic's lien described the lots as 94 and 95 in the town of Kewanna, and the findings showed that the materials were furnished for and the work done on buildings erected on lots 94 and 95 in A. D. Toner's addition to the town of Kewanna. Held, not to constitute a fatal variance, since the complaint could have been amended to show that there were no lots in the town with duplicate numbers. p. 255.

SAME.—Notice.—Lien on Two Lots.—Where material was furnished and labor performed in the construction of a house and barn, the barn being constructed on a lot adjoining that on which the house stood, both lots belonging to the same person, in the same inclosure, and used together as constituting the home residence of the owner, a single notice of a mechanic's lien against the two lots was sufficient. pp. 255, 256.

From the Fulton Circuit Court. Affirmed.

Northwestern, etc., Assn. v. McPherson.

De Witt C. Justice, George W. Holman and Rome C. Stephenson, for appellant.

Enoch Myers, for appellees.

COMSTOCK, C. J.—This suit was instituted by appellees McPherson and Ralston (dealers in paints and oils), John W. Long (lumber dealer), Rufus Blair and Philip Anderson (laborers), upon a complaint in one paragraph against appellees Lewis C. Mills and Rachel A. Mills, his wife, to foreclose separate mechanics' liens. The appellant was made defendant, the complaint alleging that it was an inferior mortgagee. Appellant filed its cross-complaint against all the appellees for the foreclosure of its mortgage as a superior lien. The court made a special finding of facts and stated conclusions of law thereon, in which it held appellant's lien to be junior to that of appellees. To the conclusions of law, the appellant at the proper time excepted. As stated by appellant's counsel, the assignment of errors brings in question (1) the right of appellee to maintain a joint action; (2) the effect of a failure to record the notice of intention to hold a lien in the miscellaneous record of the recorder's office (said record having been made in the mechanics' lien record); (3) the variance between the property described in the notices and that described in the special finding; (4) the effect of a single notice of lien against two lots for work and material to both. These questions will be considered in the foregoing order.

The action, as stated, is by several material men and mechanics. They united in the complaint in a single paragraph. The claim of each is separately stated.

In 13 Ency. of Pl. and Pr., p. 950 and 951, it is stated that "in the absence of statutory authority, lien claimants cannot unite in a suit to foreclose, unless jointly interested and jointly entitled to a lien on the property." Citing *Bush v. Connelly*, 33 Ill. 447; *Harsh v. Morgan*, 1 Kan. 293. It is further stated on the same page, "But when authorized by statute, claimants whose claims are several,

and who are without any community of interest in the claims themselves may unite in an equitable action to establish and enforce the liens, or any one of them may file a bill on his own claim, making the others defendants." Citing *Barber v. Reynolds*, 33 Cal. 497; *Longest v. Breden*, 9 Dana (Ky.) 141; *Treat Lumber Co. v. Warner*, 60 Wis. 183, 18 N. W. 747.

The statute in this State as to parties in actions for foreclosure of mechanics' liens, being §5299 Horner 1897, is as follows: "In such actions, all persons whose liens are recorded as herein provided may be made parties, and issues may be made up, and trials had, as in other cases; and the court may, by judgment, direct a sale of the land and building for the satisfaction of the liens and costs; such sale to be without prejudice to the rights of any prior incumbrancer, owner, or other persons not parties to the action. If several such actions be brought by different claimants, and be pending at the same time, the court may order them to be consolidated."

The complaint and the special findings show that neither appellees McPherson and Ralston nor either of the other plaintiffs had an interest in the claim of any other; that each performed labor and furnished material, and that each was entitled to separate relief. While claimants having several interests may be made defendants, we are of the opinion that the statute does not authorize a joinder of plaintiffs whose claims and interests are several. *Martin v. Davis*, 82 Ind. 38; *McGrew v. McCarty*, 78 Ind. 496. Had separate actions been brought by appellees, the court could have properly consolidated them, and as the claims were stated severally, and the finding and judgment several as to each plaintiff, we cannot see that appellant was deprived of any right, or was in any way prejudiced by the action of the court in overruling the demurrer to the complaint. See §348 Burns 1894, §345 Horner 1897.

Under the second question discussed, appellant argues that

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as the special findings show that the notices of intention to hold a lien were never recorded in the miscellaneous record as required by the statute, that the lien sought to be acquired could not operate against appellant's mortgage, which was executed and recorded prior to the filing of these notices by appellees. The claim is based upon the proposition that the claims sought to be enforced are purely statutory, and that claimants must bring themselves within the terms of the statute. Section 5205 Horner 1897, requires any person wishing to acquire a lien to file a notice of his intention to do so within sixty days after performing the work or furnishing labor to hold such lien. Section 5206 Horner 1897, makes it the duty of the recorder to record such notice in the miscellaneous record book. This section provides that all liens so created shall relate to the time when the mechanic or other person begun to perform the labor or to furnish the materials, and shall have priority over all liens suffered or created thereafter except the liens of other mechanics and material men, as to which there shall be no priority. Under the decisions of our Supreme Court, appellees acquired a lien upon the property by filing notice of their intention with the recorder of Fulton county. The recorder failed to record it in the proper record, but this did not defeat the lien. *Wilson v. Logue*, 131 Ind. 191; *Adams v. Shaffer*, 132 Ind. 331; *Adams v. Buhler*, 131 Ind. 66; *Wilson v. Hopkins*, 51 Ind. 231; *Leeper v. Myers*, 10 Ind. App. 314.

The question here is one between two lien holders. The lien of one is recorded, the other not, for "the recording of an instrument is effective only when made by the proper officer in the mode prescribed by law," *Adams v. Buhler*, *supra*, *Gilchrist v. Gough*, 63 Ind. 576, *State v. Davis*, 96 Ind. 539, *Smith v. Lowry*, 113 Ind. 37, and did the right to a lien depend upon the record of these instruments, we would have to hold that appellees had no claim as against appellant. It is conceded by appellant's learned counsel that under the decisions of the Supreme Court of this State, the

filing of the notice secures the lien as between the owner and the lien claimant, but it is denied that the lien can be thus obtained as against an innocent third party for value. This precise question, so far as we are advised, has not been passed upon in this State. The wording of the statutes of the various states upon the subject of mechanics' liens is dissimilar, and reported cases in which they are construed do not greatly aid us. It seems to us, however, as reasonable, that when a mechanic or laborer does all that the statute requires him to do, he is entitled to whatever right the statute gives as against any one. He is required to file his notice for record with the recorder of the county; there his duty ends. Our Supreme Court has held that from that time the lien takes effect. We cite in this connection *Tousley v. Tousley*, 5 Ohio St. 78; *Mutual Ins. Co. v. Dake*, 87 N. Y. 257; *Bedford v. Tupper*, 30 Hun 174; *Merrick v. Wallace*, 19 Ill. 486; *Woods' and Brown's Appeal*, 82 Pa. St. 116; *Brooke's Appeal*, 64 Pa. St. 127.

The liens of appellees, in whose favor liens were declared, relate to the times when the work was commenced or the materials begun to be furnished. According to the findings, the notices were not filed until after the mortgage was recorded, but McPherson and Ralston's lien relates to April 13, 1896; Long's lien to March 26, 1896; both prior to the date of the execution of appellant's mortgage. Where one acquires a lien on property with knowledge of the purposes to which such property may be employed by the owner, and that under the statute it may be subjected to other acquired liens in favor of laborers and material men, the statute under which such after acquired liens may be created forms a part of the mortgage, and the mortgage is subject to such statutory lien as may thereafter attach to such property. *Thorpe Block, etc., Assn. v. James*, 13 Ind. App. 522; *Jenckes v. Jenckes*, 145 Ind. 624; *Wayne, etc., Assn. v. Moats*, 149 Ind. 123; *Deming-Colborn, etc., Co. v. Union Nat., etc., Assn.*, 151 Ind. 463, 467. The court declared a prior lien on the

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buildings only in favor of appellees, and gave to appellant its priority as to the lots. In view of the facts found, and the law, it is doubtful whether the appellant occupies the position of an innocent mortgagee without notice, but, in the view taken, this question is immaterial.

As to the third proposition discussed, viz., the variance between the property described in the special findings and in the notice, there is not necessarily a variance. The findings show that the materials were furnished for, and the work done on, buildings erected on lots ninety-four and ninety-five in A. D. Toner's addition to the town of Kewanna. The notices described the lots ninety-four and ninety-five in the town of Kewanna. It does not appear that appellant was misled by the description. The court will not presume that there were duplicate numbers of lots in Kewanna, and had the finding followed the language of the notice, it would have been sufficient for the purpose of identification. The complaint could have been amended to show that there were no lots in the town of Kewanna with duplicate numbers, and will be treated by the court as so amended. *White v. Stanton*, 111 Ind. 540; *Dalton v. Hoffman*, 8 Ind. App. 101; *McNamee v. Rauck*, 128 Ind. 59.

As to the fourth and remaining question discussed, we are of the opinion that the single notice of liens against the two lots was sufficient. The complaint avers that the two lots constitute "a single building site." The findings show that on the first day of March, 1896, and from thence till now, Rachel A. Mills was the owner of lots ninety-four and ninety-five in A. D. Toner's addition to the town of Kewanna, in Fulton county, Indiana; that lot ninety-four is situated at the corner of Aurora and Toner streets, and with a front on Aurora street of sixty-three feet, and depth on Toner street of 148 feet; that lot ninety-five lies immediately west of lot ninety-four, fronting also on Aurora street, and sixty-three feet wide, with depth of 148 feet. Along the west side of lot ninety-five is an alley, and an alley also on the

north end of both lots. These lots are ordinary sized lots in the town of Kewanna, and situated on residence streets in said town. Lewis C. Mills is the husband of Rachel A. Mills. On or about the 15th day of March, 1896, Lewis C. Mills began the erection of a dwelling-house on lot ninety-four, near the intersection of Aurora street and Toner street, the east limit of said dwelling being situated about eight feet from Toner street, and the south limit of said building being about ten feet from Aurora street, and the west limit of said building being about fifteen feet east of the west line of said lot ninety-four.

While said dwelling-house was in process of erection, Lewis C. Mills began the erection of a small barn or stable on the extreme west side of lot ninety-five at the corner of said lot ninety-five and Aurora street, width of fourteen feet, with a shed on the east side of ten feet front by twenty-four feet in depth along the alley. The erection of the house was begun before the erection of the barn was contemplated, but some time before the house was completed the barn was commenced, and from that time work went on, both on the house and barn, and both of them were substantially finished at the same time. The dwelling and stable are not physically connected with each other, and their nearest limits are thirty feet apart, but are used together as constituting the home residence of Lewis C. Mills and Rachel A. Mills. Before the house was built, Lewis C. Mills had erected a fence across lots ninety-four and ninety-five from east to west, near the center of said lots, and around the entire premises. The house and barn were found to be in the same inclosure, thirty feet apart, constituting the home residence of Lewis C. Mills and Rachel A., his wife. The court finds that work was done on, and materials furnished for, both dwelling and barn without specifying the particular value thereof upon each structure.

The question, we think, is decided adversely to appellant's claim in the *Premier Steel Co. v. McElwaine-Richards, etc.*,

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Co., 144 Ind. 614, to which case, and the authorities there cited, we refer. See, also, *Crawford v. Anderson*, 129 Ind. 117. We find no error for which the judgment should be reversed. Judgment affirmed.

Henley and Wiley, JJ., dissent.

DISSENTING OPINIONS.

HENLEY, J.—Section 5299 Horner 1897, does not authorize several lien holders to join in an action to foreclose. The question is raised by the demurrer for want of facts. *Jones, Treas., v. Rushville Nat. Bank*, 138 Ind. 87. It is not contended that there is any community of interest between appellees such as would authorize them jointly to prosecute this action. The error in overruling the demurrer to the complaint was such a palpable violation of the law of pleading and practice as established by the decisions of the Supreme Court in this State that the cause for this reason alone ought to be reversed. *Jones, Treas., v. Rushville Nat. Bank, supra*; *Martin v. Davis*, 82 Ind. 38; *Stephenson v. Martin*, 84 Ind. 160; *Pennville Nat. Gas. Co. v. Thomas*, 21 Ind. App. 1.

WILEY, J.—I concur in the dissenting opinion of Henley, J. There is, however, another reason why, in my judgment, the conclusion reached by the trial court is erroneous, and that is there is such a variance between the allegations of the complaint and the facts specially found, as to the description of the real estate, that appellees could not recover. This court cannot say that lots ninety-four and ninety-five, in the town of Kewanna, are the same as lots ninety-four and ninety-five in Toner's addition to the town of Kewanna.

THE WABASH RAILROAD COMPANY v. MCCORMICK ET AL.

[No. 2,896. Filed November 15, 1899.]

CONTINUANCE.—*Withdrawal of Juror.—Dismissal and Nonsuit.*—

During the progress of a trial plaintiff moved for leave to file an amended complaint, which was sustained, and he thereupon asked leave to withdraw a juror, which was granted, and the court discharged the jury and continued the cause over defendant's objection and motion to dismiss. *Held*, that the withdrawal of the juror was superfluous and gave plaintiff no additional rights, and that defendant's motion to dismiss should have been sustained.

From the De Kalb Circuit Court. *Reversed.*

W. V. Stuart, E. P. Hammond, D. W. Simms, E. P. Hammond, Jr., J. E. Rose and J. H. Rose, for appellant.

L. M. Ninde, D. B. Ninde, H. W. Ninde and F. S. Roby, for appellees.

ROBINSON, J.—Appellees sued for damages arising under a live stock contract.

It appears by a bill of exceptions that, on the trial at the March term of the DeKalb Circuit Court, appellees, on April 6th, 7th, 8th, and 9th, introduced their evidence and rested, with the privilege of introducing another witness; appellant began the introduction of its evidence, and, having introduced one witness, the court announced that the evidence which appellees proposed to introduce by the witness who had not yet testified would not be admitted; and thereupon appellees moved for leave to file an amended complaint. This motion was supported by the affidavit of one of appellees' attorneys, to the effect that during the introduction of the evidence and after the trial had begun it was first discovered by the attorneys that the complaint, more especially the third paragraph, was insufficient in failing to allege a compliance with certain named conditions of the contract between the parties, that appellees did not have evidence

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admissible under the court's rulings to prove such fact, and could not produce such evidence in time to introduce it during the trial, that if leave was granted to file such amended complaint the plaintiff would be able to support the same and the allegations thereof relative to the performance of such conditions, that the application was not made to secure delay merely but in order that a fair trial might be had and a judgment had upon the merits.

This motion was sustained, and thereupon appellees asked leave to withdraw the juror, William Kennedy, to which appellant objected for the reason that there was no showing that the juror was incompetent, sick, or in any way disqualified to proceed with the trial; that appellant was present and announced to the court that it was ready with its witnesses to proceed with the trial; that the withdrawal of a juror is something unknown to the practice in this State; and that it was not shown that appellees were not ready to proceed with the trial at that time. The request to withdraw the juror was granted, and over appellant's objection the juror was withdrawn; the court discharged the jury and continued the cause. The costs were adjudged against appellees.

The bill recites that the juror withdrawn was in no way incompetent or disqualified to sit as a juror in the cause, was not sick or under any disability which prevented him from serving as such juror, nor did appellees make any showing why they were not able to proceed with the trial at that time, except such cause as is shown in the affidavit to amend the complaint.

When the juror was withdrawn and the jury discharged, appellant moved to dismiss the case, for the reason that the withdrawal of a juror and the discharge of the jury over the defendant's objection was in legal effect a dismissal. At the next term of court this motion was overruled, and the amended complaint was filed, to which appellant specially appeared and pleaded in abatement of the court's jurisdiction over the person, setting up the fact of the former trial

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at the March term, the withdrawal of the juror and discharge of the jury, that the amended complaint was filed at the May term, and that no summons had been issued on the alleged amended complaint. Issue was formed by replies to this answer, a trial was had, resulting in a finding against appellant, and, over its motion for a new trial, judgment was rendered in appellees' favor for costs in the case up to that time.

It is within the court's discretion to permit the complaint to be amended, and it does not appear there was any abuse of discretion in this instance. The record shows that immediately after leave to amend was granted, appellees asked leave to withdraw the juror, which was granted, and the juror was withdrawn, and the jury discharged by the court and the cause continued.

As no provision is made in the code for withdrawing a juror, it is necessary to consider the effect of such action at common law.

It is argued by appellees' counsel that the common law practice of withdrawing a juror was continued in force under the code, and that it is entirely consistent with the code.

Our statute provides that, among other laws, "The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local to that kingdom" and not inconsistent with the federal and state Constitutions, and not inconsistent with federal and state statutes, shall be the law of the State. §236 Burns 1894. Under this act, if there is a statute covering a subject-matter it must control. If the statute on any particular subject is different from the common law on the same subject, the common law is to that extent inconsistent with the statute, and is not in force. Under the code the rules of the common law do not control in any case where complete provision is

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made by a statute. These rules may be looked to in interpreting the statute, but they cannot control it. We do not mean to hold that courts are restricted to the exercise of mere statutory powers. They are coördinate branches of the government, and possess inherent powers not derived from any statute. If a statute fails to provide a complete remedy, the common law may be invoked in so far as it is not inconsistent with federal and state constitutions and statutes. But if the statute does provide a mode of procedure, it must be followed and obeyed. See *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Nealis v. Dicks*, 72 Ind. 374; *Cloud v. Bruce*, 61 Ind. 171; *Stevenson v. Cloud*, 5 Blackf. 92.

At common law there were two ways, among others, of stopping the case. One was by voluntary nonsuit, and the other was the withdrawal of a juror. Abbott's Trial Brief, pp. 107, 108.

At common law a plaintiff might, as matter of right, become nonsuit at any time before the verdict. He had this right at any stage of the proceedings he might prefer, even till after the verdict rendered, or, if tried by the court, until the judge had pronounced his judgment. He could then reserve to himself the power to bring a fresh action for the same subject-matter. 3 Black. Comm. 376; *Murphy v. Donlan*, 5 Barn. & Cr. 178; *Robinson v. Lawrence*, 7 Exch. 123; *Keat v. Barker*, 5 Modern 208; *Outhwaite v. Hudson*, 7 Exch. 380; Co. Litt. 138b, 139a; Bacon's Abr., Nonsuit, D.

This rule was afterwards modified by statute in England denying the plaintiff the right to become nonsuit after verdict against him. But in this country the rule seems to have been that, before the trial, the plaintiff might become nonsuit as matter of right; but that after the cause was opened to the jury whether plaintiff might become nonsuit was within the discretion of the court. *Haskell v. Whitney*, 12 Mass. 47; *Locke v. Wood*, 16 Mass. 317; *Inhabitants of Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*,

124 Mass. 357; *Judge of Probate v. Abbot*, 13 N. H. 21; *Fulford v. Converse*, 54 N. H. 543; *Proprietors v. Davis*, 2 Me. 352; *Larrabee v. Rideout*, 45 Me. 193.

An examination of the authorities leads us to the rule that before trial a plaintiff may become nonsuit as matter of right; after the trial has begun, and before verdict, leave to become nonsuit is in the discretion of the court, and after verdict there can be no nonsuit. It is evident the old rule was modified for the reason that, as a nonsuit is not a bar to a future action, it is necessary that there be protection to a defendant against having to prepare to defend against the same cause of action as often as a plaintiff might see proper to become nonsuit and bring his action over. The costs might be wholly inadequate to compensate him for continued preparation for trial and litigation.

A nonsuit at common law might be voluntary or involuntary. An involuntary nonsuit is for neglect either to appear, or, having appeared, for failure to present evidence to sustain a verdict in his favor, and is ordered against plaintiff's objection. Under our code practice a court has no power to order an involuntary nonsuit. *Williams v. Port*, 9 Ind. 551; *Stults v. Forst*, 135 Ind. 297. A voluntary nonsuit is allowed by the court on the plaintiff's own motion. The plaintiff submits to the court that he has not made, or can not make out, a case, and asks in effect that it be dismissed. A motion by a plaintiff for a nonsuit under our code is a dismissal. *Burns v. Reigelsbeger*, 70 Ind. 522.

"Withdrawing a juror," says Anderson's Law Dictionary, "describes a fiction to which a court may resort when it appears that, owing to some accident or surprise, defect of proof, unexpected and difficult question of law, or like reason, a trial can not proceed without injustice to a party." In Abbott's Trial Brief, pp. 107, 108, it is said: "A judge has power, in his discretion, in case of surprise or other cause which would render the progress of the trial unjust or unfair to either party, to withdraw a juror and postpone the trial." See Abbott's Law Dictionary.

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In 2 Burrill's Law Dictionary, it is said: "The withdrawing of a juror is always by the agreement of the parties, and is frequently done at the recommendation of the judge, where it is doubtful whether the action will lie." See, also, 2 Tidd's Prac. (2nd. Am. ed.) 909, and 3 Chitty's Prac. 917, to the same effect; also *Gibbs v. Ralph*, 14 M. & W. 804; *Sanderson v. Netsor*, R. & M. 402, 21 Eng. Com. L. 472 (780); Arch. Prac. 196.

In *Messenger v. Bank*, 48 How. Prac. 542, it was held that the practice there adopted and long settled was that in cases of surprise the court might, upon the plaintiff's application, direct a juror to be withdrawn, and order the case to stand over for trial upon some future day. Citing *People v. Judges*, 8 Cowen 127; *People v. Olcott*, 2 Johns. Cases 301; *People v. Ellis*, 15 Wend. 371; *United States v. Coolidge*, 2 Gall. 364. See, also, *Chandler v. Bicknell*, 5 Cowen 30; *People v. Marks*, 10 How. Prac. 261; *Glendening v. Canary*, 5 Daly 489, 64 N. Y. 636.

In *People v. Ellis*, 15 Wend. 371, three defendants were put on trial for assault and battery and riot; after the district attorney rested, the defendants offered to prove that on the preceding day two of the defendants were put on trial on the same indictment, and, after the prosecution had given its evidence, the court, on motion of the district attorney, and against defendants' consent, withdrew a juror, to enable him to bring on the trial against the three defendants, which evidence was refused. It was held that the power of the court as to the withdrawal of a juror after the jury was impaneled and sworn, in misdemeanors, rested as much in the exercise of a sound discretion as in civil cases.

In *People v. Judges*, 8 Cowen 127, plaintiff failed to prove a material point in his case. The court refused to nonsuit the plaintiff, but permitted him to withdraw a juror. An application afterwards made for mandamus to compel the judges to reinstate the cause was granted because defendant had fraudulently deprived plaintiff of the benefit of certain evidence which would have sustained his case.

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In *Chandler v. Bicknell*, 5 Cowen 30, the plaintiff unexpectedly failed at the trial to prove the absence from the state of a subscribing witness to a bond so as to let in secondary evidence; on his motion the judge allowed him to withdraw a juror and the cause went off for the circuit. A motion by the defendant for judgment, as in case of nonsuit, was granted.

In *People v. Marks*, 10 How. Prac. 261, it is held that in cases of surprise the plaintiff must apply to the court for leave to withdraw a juror, or else submit to a nonsuit; but that he can not after submitting his cause, and finding the verdict against him, ask the court to relieve him on the ground of surprise.

In *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cases 622, the question was whether, when a party is on trial before a jury, and a circumstance occurs which will occasion a total failure of justice if the trial proceed, the court, in such an emergency, had power to withdraw a juror, and it was held that the discretion exists. This case is cited in *State v. Walker*, 26 Ind. 346, upon the question of a court's discretion in discharging a jury which has failed to agree upon a verdict.

In the case of *People v. Olcott*, 2 Johns. Cases 301, the jury was unable to agree upon a verdict, and the court, without the prisoner's consent ordered a juror to withdraw, and the rest being called and only eleven answering they were discharged. The question afterwards arose whether this discharge of the jury was an acquittal of the defendant, and it was held that it was not. In this case, Chancellor Kent reviews the English authorities upon the question whether the discharge of a jury in a criminal case after being unable to agree upon a verdict operated as an acquittal.

In *Glendenning v. Canary*, 5 Daly 489, it is said that the court on the trial of civil cases upon being satisfied that any real ground of surprise exists, such as the unexpected absence of witnesses who had been in attendance, or that had

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been kept out of the way, the sickness of a juror, party, or counsel, or any other accident occasioned by substantial misapprehension or disappointment, which would render its further progress unjust or unfair to either party, may, in the exercise of a sound discretion, direct the withdrawal of a juror, or discharge the jury and postpone the trial.

In *Yellow Pine Co. v. Gutwillig*, 46 N. Y. Supp. 251, it does not appear whether the request to withdraw a juror was for cause or not. No authority is cited, and there is nothing in the opinion from which that fact can be determined. The same is true of the case of *St. John v. Duncan*, 2 Monthly L. B. 20, where the plaintiff was allowed to withdraw a juror, on payment of costs, and amend the complaint.

Whether it should be concluded from the above that a juror could be withdrawn only by agreement of parties, or that it might be done upon plaintiff's request, yet we think it can be said that a rule was followed, that leave to withdraw a juror was granted a plaintiff upon cause shown, and that the cause arose during the trial. None of these authorities sustain the position that the court might arbitrarily grant a plaintiff's request to withdraw a juror and then continue the case. In fact, we think, the reasoning leads to the conclusion that the withdrawal of a juror without cause had the effect to dismiss the case. At any rate, the above cases are not authority that a plaintiff might continue the case by simply withdrawing a juror over defendant's objection. Thus in the case of *King v. Jeffs*, Strange 984, the court refused, in a case of barratry, to permit a juror to be withdrawn on motion of the prosecutor after he had gone into proof and found himself deficient because the punishment might be infamous, but it was said it might be and had been done in other cases of misdemeanors. In commenting on this case in *People v. Olcott*, 2 Johns. Case 301, Chancellor Kent held that that case controls an improper exercise of the power of the court but does not deny its existence; that, "It perhaps admits too much; for to allow the prosecutor, in any case,

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to withdraw a juror, because he finds himself not fully prepared in his proofs, is an unreasonable indulgence, unless it should be made to appear that some part of the testimony was wanting through the contrivance or agency of the defendant."

In *Planer v. Smith*, 40 Wis. 31, the plaintiff, on a trial in replevin, was surprised by certain testimony on the defendant's part which he was then unable to meet; the court thereupon allowed him to withdraw a juror, but, instead of continuing the cause, gave defendant judgment, dismissing the complaint, and for the value of the property. It was held that the court might, in the proper case, permit a juror to be withdrawn, or to order a nonsuit; that the withdrawal of a juror operates to continue the case and does not entitle defendant to a judgment of any kind. "The judgment before us is erroneous because it was evidently rendered on the theory that judgment must necessarily follow the withdrawal of a juror. But, were any judgment proper, it should only be a judgment of nonsuit, which, of course, would be no bar to another action for the same cause."

And so under the Indiana code, if a plaintiff stops his case by withdrawing a juror, the defendant is not entitled to a judgment because of such withdrawal. The only judgment that could be rendered would be a judgment of nonsuit, or dismissal. The effect of withdrawing a juror is to stop the case. It can have no other effect. Complete provision is made by the code for stopping a case. A plaintiff may either dismiss, or, upon cause shown, continue. If he wishes to dismiss without prejudice, he may do so, and if he wishes a continuance, he may have it upon sufficient cause shown for a continuance. But the withdrawal of a juror in either case is superfluous. It can give him no additional rights. A court can not arbitrarily continue a case over a defendant's objection. It is not claimed that the affidavit filed when leave was asked to amend is a sufficient affidavit for a continuance. It certainly was not. The case stands as though arbitrarily

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continued without cause over defendant's objection. If a plaintiff resorts to the common law practice of withdrawing a juror, its effect must be determined by the provisions of the code governing dismissals and continuances.

The code does not recognize any practice that would permit either party at any stage of the trial without showing cause to continue the case by withdrawing a juror. But to this the practice adopted by the trial court would certainly lead. After appellees had amended their complaint they found they were not prepared to proceed with the trial. No reason has been pointed out why their rights to a continuance then were greater than before the jury was called to try the case. It will certainly not do to say that a plaintiff may continue in the trial until he finds he is unable to prove a material fact in his case, and, without showing any cause for a continuance, withdraw a juror and have the trial postponed over the defendant's objection. The code does not authorize such a proceeding. When appellees withdrew the juror without showing cause sufficient for a continuance, they dismissed their action under the statute, and the costs up to that time were properly adjudged against them. §336 Burns 1894.

After the withdrawal of the juror and the discharge of the jury, appellant's motion to dismiss the case should have been sustained, for the reason that the withdrawal of the juror and discharge of the jury over appellant's objection was in legal effect a dismissal. Judgment reversed.

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[No. 2,927. Filed November 15, 1899.]

BILLS AND NOTES.—Alteration.—Principal and Surety.—Release of Surety.—Where an agreement was made that a note should bear eight per cent. interest, and the principal and surety signed the same in blank as to the rate of interest, the subsequent insertion of the rate by the principal and payee, without the knowledge of the surety, constituted a material alteration in the note, and released the surety.

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From the Hamilton Circuit Court. *Reversed.*

S. D. Stuart and *C. G. Reagan*, for appellant.

I. W. Christian, *W. S. Christian* and *J. E. Hodgins*,
for appellee.

WILEY, J.—Appellee sued appellant and one Elwood Moore upon three promissory notes. A joint answer in two paragraphs was filed. The first was a general denial, and the second a plea of *non est factum*. A trial by jury resulted in a general verdict against both of the defendants below. The jury also answered interrogatories submitted to them upon special questions of fact. Appellant alone moved for a new trial, which was overruled, and judgment was rendered on the verdict. The overruling of the motion for a new trial is the only error assigned. The facts upon which the decision of the case must rest are fairly stated by the jury in their answers to interrogatories, and are as follows: That prior to the execution of the notes sued on, appellant and Elwood Moore had executed and delivered to appellee a certain note; that after its maturity, suit was brought upon it; that there was then due thereon \$159.35; that pending said action, the same was compromised on the terms that appellant and Elwood Moore should execute the three notes in suit, aggregating the amount due on the original note, the latter notes to bear eight per cent. interest and to become due in one, two, and three years from date; that the notes sued on were executed in pursuance to that agreement; that appellant and Elwood Moore each signed the notes in suit; that when they signed them the rate of interest was not specified; that the figure "8" was written in the notes at the request of the appellee after they were signed; that the alteration by inserting the figure "8" was made without the knowledge of appellant, and that such alteration was made in accordance with an agreement made prior thereto between appellant and appellee. While these are the facts specially found, there are other material facts which appear from the evidence that

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are of sufficient importance to merit mention. Appellant and Elwood Moore were brothers, and appellant was surety for Elwood. The note in settlement of which the notes in suit were given was executed several years prior to the commencement of suit upon it. The notes in suit were written or filled out by a brother of appellant at the house of Elwood Moore, where they were signed. After they were thus signed, Elwood took them to the home of appellee, showed them to him, and he then agreed to accept them in settlement of the then pending litigation, if his attorney said they were "all right." Elwood and appellee then went to the office of appellee's attorney; the notes were shown to him, and he declared they were "all right" except the rate of interest was left blank. After some conversation between them, it was agreed, and so stated, that the rate of interest was overlooked, and it was then and there agreed between appellee and Elwood that the figure "8" should be inserted in compliance with the agreement. This was done by the attorney in the presence of Elwood and appellee. The evidence is conflicting as to whether appellee accepted the notes when they were first shown to him at his house, or after the conference at the office of the attorney, and after the figure "8" was inserted therein.

The question presented for decision, therefore, is simply this: Where an agreement is made that notes shall be executed bearing eight per cent. interest, and the principal and surety sign them in blank, as to the rate of interest, can the rate of interest be inserted in the notes in conformity with the agreement between the parties, in the presence and with the consent of the principal and payee, and without the knowledge and consent of the surety, and the latter be bound?

If the insertion of the rate of interest is a material alteration of the instrument, within the meaning of the law, then the surety is released, unless the agreement that the notes should bear the rate of interest inserted changes the rule.

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The rule that governs here differs from that which holds an indorser of a note liable, where he signs or indorses it in blank as to date, amount, payee, and where payable, and delivers it to the maker, and the latter fills the blanks. In such case it is held that the indorser gives to the maker implied authority to fill such blanks so as to give the instrument force and effect, and to make it a perfect instrument. See *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Wilson v. Kinsey*, 49 Ind. 35; *Rich v. Starbuck*, 51 Ind. 87; *Emmons v. Meeker*, 55 Ind. 321; *Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665; *Gothrapt v. Williamson* 61 Ind. 599; *Brown v. Bank*, 115 Ind. 572; *Marshall v. Drescher*, 68 Ind. 359; *DePauw v. Bank*, 126 Ind. 553, 10 L. R. A. 46.

In the case before us, however, the notes in question were perfect instruments when signed by appellant. He knew, as is shown by the evidence, which is uncontradicted on this point, that no rate of interest was specified when he signed the note. This, however, would not in any sense affect their validity, for under the statute any promise in writing to pay money, where no rate of interest is fixed by the writing itself, such promise shall bear six per cent. interest. §7043 Burns 1894.

In *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469, it was held that where a note had been altered after it had been signed, by inserting the figure "8" before the words "per cent. interest," without the knowledge or consent of the maker, was such a material alteration that a recovery could not be had. Elliott, C. J., in rendering the opinion of the court, said: "The alteration in the note was a material one, * * *. 'It is a material alteration,' says Mr. Randolph, 'to add an interest clause, even without any fraud on the holder's part.' 3 Randolph Com. Paper, §1756." Continuing the learned judge said: "This conclusion is fully sustained by the decided cases," citing *Hert v. Oehler*, 80 Ind. 83; *Bowman v. Mitchell*, 79 Ind. 84, and cases cited; *Schnewind v.*

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Hacket, 54 Ind. 248; *Shanks v. Albert*, 47 Ind. 461; *Boustead v. Cuyler*, 116 Pa. St. 551; 1 Am. & Eng. Ency. of L. 510. See, also, *Hart v. Clouser*, 30 Ind. 210; *McCoy v. Lockwood*, 71 Ind. 319.

When the notes in suit were signed by appellant, and came to the possession and knowledge of appellee, they were complete and perfect instruments in all respects. If appellee desired to change the contract as expressed by the notes, it was his duty to treat with appellant as one of the parties to the contract, and secure his assent thereto. *DePauw v. Bank of Salem*, 126 Ind. 551, 10 L. R. A. 46.

Mr. Daniel on Negotiable Instruments, §1385, says: "In the fifth place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the percentage of interest, is of the same character as if it changed the principal." The author cites many authorities in support of the rule. From the authorities, we are led to the conclusion that the verdict was not sustained by sufficient evidence, and was contrary to law, and hence will not support a judgment against appellant. This conclusion makes it unnecessary to decide other questions discussed.

The judgment is reversed, and the court below is directed to sustain appellant's motion for a new trial.

STATE EX REL. GOODHUE v. BURKAM.

[No. 2,889. Filed November 16, 1899.]

EXECUTORS AND ADMINISTRATORS.—Decedents' Estates.—Final Report.—Collateral Attack.—The approval by the court of the final report of the administrator, and his discharge, duly entered of record in the proper order-book, has the force and effect of a final judgment, and cannot be collaterally attacked unless the adjudication was without notice. *p. 273.*

SAME.—Guardian and Ward.—Administrator as Guardian.—A guardian who is the administrator of an estate cannot represent the interest of his ward in such estate, and a judgment approving the

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final report of an administrator who as guardian receipted for his ward's interest in the estate, without notice, or the appointment of a guardian *ad litem*, is void as to such ward. pp. 273, 274.

From the Dearborn Circuit Court. *Reversed.*

G. M. Roberts and *C. W. Stapp*, for appellant.

Johnston & Givan, for appellee.

COMSTOCK, C. J.—The only question presented by the assignment of errors in this cause is whether the circuit court erred in sustaining the demurrer to the amended complaint.

The complaint shows that on the 7th of July, 1880, Ira Goodhue, a resident of Dearborn county, died testate the owner of property worth about \$27,000; that, by the will of Ira Goodhue, the relator, a nephew, was entitled on final settlement of the estate to \$992.20; that on the 4th day of August, 1880, George B. Fitch then a resident of said county was appointed administrator with the will annexed of the estate of said Goodhue, and executed his bond as such administrator with Dewitt C. Fitch and the defendant as sureties; that on March 29, 1882, said George B. Fitch, administrator, etc., filed in the Dearborn Circuit Court his final settlement report, which was approved by the court, and he was fully discharged from further liability as such administrator; that at the time of such final settlement the relator was a minor, about eight years of age, a resident of the state of Ohio. Prior to said final settlement (the complaint does not show when), said George B. Fitch was appointed guardian of the relator, and in final settlement of the estate he showed by his report that he paid the relator's share to himself as such guardian, and filed with said report a voucher therefor. A part of the record of said final settlement is set out in the complaint.

It is alleged in the complaint that the records and proceedings of record relating to said estate and the settlement thereof fail to show that any notice, publication, summons, or process was ever at any time given, either of the appointment of the said Fitch as such administrator, or of the alleged

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final settlement of said estate; that no such notice of appointment or of final settlement was ever given at any time, and that said record and proceedings fail to show that the relator, either by himself, next friend, or by guardian or guardian *ad litem* was in any way made a party to said alleged final settlement, or that he either by himself, or by guardian *ad litem*, appeared to said final settlement, other than the fact that said administrator claimed in said report to have paid to himself as guardian of relator the said sum as hereinafter averred. It is alleged that no money was actually paid by Fitch as administrator into the hands of said clerk of said court, or to any other person lawfully entitled to receive the same for the use and benefit of said relator; that the relator did not appear at said final settlement, had no knowledge or notice until after he became of age, and that he had no notice or knowledge of the appointment of Fitch as his guardian. That when relator arrived at the age of twenty-one years, Fitch and his sureties on the guardian's bond were insolvent; that said Fitch died in 1897, a resident of Hamilton county, Ohio, leaving no estate; that the co-surety of the defendant on the administrator's bond is dead, leaving no estate; that Fitch in his lifetime made certain conveyances of property to secure certain creditors, designating one as "the estate of Ira Goodhue;" that relator received out of the proceeds of said property \$354.96, and the balance of the legacy bequeathed to him is unpaid, and he claims and demands judgment against the defendant for \$2,500.

The approval of the court of the final report of the administrator, and his discharge, duly entered of record in the proper order-book of the court, has the force and effect of a final judgment and can not be collaterally attacked unless the adjudication is without notice. *Peacock v. Leffler*, 74 Ind. 327; *Barnes v. Bartlett*, 47 Ind. 98; *State v. Slauter*, 80 Ind. 597; *Ferguson v. State*, 90 Ind. 38. It must be conceded that this action, so far as it attacks the judgment approving the report and the discharge of the administrator, is a collateral attack. Whatever may be said as to what the

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record shows as to notice of final settlement, it clearly appears that appellant was not represented in the final report by any one except as shown by the final report that Fitch, as guardian, receipted to himself as administrator for the legacy of appellant. The object of a notice is to give everyone interested in the estate an opportunity to be heard as to the matters affecting him. The offices of administrator and guardian held by Fitch were antagonistic; the guardian could not represent his ward and himself as administrator. He could not as guardian of his ward approve of his own report as administrator. A guardian who is not the administrator of the estate may represent his ward in the settlement of the estate, and may receipt for the share of his ward, but certainly the law could not contemplate that a guardian could thus determine the rights of his ward. The guardian was simply acting for himself, approving his own report. In such case, it is the duty of the court to appoint a guardian *ad litem* to look to the interest of the estate. The judgment approving of the final report, so far as the rights of appellant were alleged to be determined, was void. He had no notice of the final settlement, and was not represented in its consideration.

Judgment reversed, with instructions to the trial court to overrule the demurrer to the amended complaint.

KAHN ET AL v. GAVIT.

[No. 2,907. Filed November 16, 1899.]

APPEAL AND ERROR.—Assignment of Error.—Defect of Parties.—A defect of parties is not presented by an assignment that the complaint does not state facts sufficient to constitute a cause of action. p. 277.

SAME.—Assignment of Error.—Waiver.—An assignment of error is waived by failure to discuss it. p. 277.

SAME.—Assignment of Error.—Defect of Parties.—An assignment of error "that there is a defect in parties plaintiff, in that necessary parties plaintiff have not been made" presents no question on review. p. 277.

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APPEAL.—Assignment of Error.—Error in finding against appellant on a plea in abatement is not properly presented by an assignment that “the court erred in overruling and finding against appellant’s plea in abatement herein filed.” *p. 277.*

REPLEVIN.—Action on Bond.—Parties.—The assignee of a judgment may maintain an action on a bond given the sheriff in replevin of goods levied upon by virtue of an execution issued for the collection of the judgment without making the sheriff a party. *pp. 278, 279.*

APPEAL AND ERROR.—Joint Assignment of Error.—No error is presented on a joint assignment as to the action of the court in sustaining a demurrer to several paragraphs of a pleading if either paragraph is bad. *p. 279.*

SAME.—Record.—Available error cannot be predicated upon the ruling of the court on a demurrer, where the demurrer is not in the record. *p. 279.*

SAME.—Assignment of Error.—Verdict.—An assignment “that the court erred in its conclusions of law in its findings for the appellee” presents no question where there was a general verdict. *p. 279.*

EVIDENCE.—Harmless Error.—Replevin.—Alleged error in the admission of evidence in the trial of an action on a replevin bond, as to the value of a horse which had died after the execution of the bond, was harmless, where there was nothing in the judgment to indicate that the court considered the value of the horse in arriving at the amount of the judgment. *p. 280.*

From the Lake Superior Court. *Affirmed.*

E. M. Seymour and L. T. Meyer, for appellants.

F. N. Gavit and J. A. Gavit, for appellee.

HENLEY, J.—Action by appellee upon a replevin bond executed by appellants to M. L. Conroy, R. H. Wells, and Benj. F. Hayes, Sheriff of Lake county, Indiana, who as such sheriff had levied upon certain property by virtue of an execution issued for the collection of a judgment obtained against said Conroy in a case entitled Sample v. Conroy, in said court. The judgment against Conroy was assigned in proper form to appellee by the owner thereof, one Littleton Sample, and thus appellee succeeded to whatever rights said Littleton Sample had growing out of such ownership. Briefly stated this record shows the following state of facts: (1) That one Littleton Sample obtained a judgment against M. L. Conroy; (2) that said Sample sold and assigned said

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judgment to appellee; (3) that an execution was issued upon said judgment against said Conroy, and placed in the hands of Hayes, the sheriff of said county, who levied upon and took possession of three horses as the property of said Conroy; (4) that appellants, holding a chattel mortgage upon said horses, began an action in replevin against said Conroy and said sheriff, and gave the necessary bond and took possession of said horses. Said suit to replevy the horses from the sheriff was tried in the superior court of Lake county, and a judgment was rendered in favor of said Hayes as sheriff and against the appellants herein; (5) that said appellants have refused, and still refuse, to return said property to the sheriff, and that said Conroy owns no other property subject to execution within this State, and that the execution has been returned by the sheriff wholly unpaid and unsatisfied.

Appellant filed an answer in this cause consisting of five paragraphs, and also an answer in abatement. A demurrer to the answer in abatement was overruled, and, upon the trial of the issue presented by the plea in abatement, the finding and judgment was in favor of appellee, that the action do not abate; in fact appellants did not introduce any evidence upon the trial of this issue.

Appellee's demurrer for want of facts was sustained to the second and fourth paragraphs of answer, and overruled as to the third and fifth. There was a trial upon the issue tendered by the answers in bar, and finding and judgment in favor of appellee, and from said judgment this appeal is prosecuted.

The appellants have assigned error as follows: "(1) The complaint does not state facts sufficient to constitute a cause of action. (2) That the superior court of Lake county had no jurisdiction of the subject-matter of said action. (3) That there is a defect in parties plaintiff in that necessary parties plaintiff have not been made. (4) The court erred in overruling and finding against appellants' plea in abatement herein filed. (5) The court erred in overruling appellants' demurrer to plaintiff's complaint. (6) The court erred

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in sustaining appellee's demurrer to appellants' second, third, fourth, and fifth paragraphs of answer. (7) The court erred in its conclusions of law in its findings for the appellee. (8) The court erred in overruling appellants' motion for a new trial of said cause on the grounds and for the reasons set forth in said motion as appears on pages twenty-three and twenty-four of the record hereof. (9) The court erred in overruling appellants' motion in arrest of judgment. (10) The court erred in refusing to strike out certain costs and fees. (11) The court erred in refusing to tax all costs against appellee. (12) The court erred in its assessment of damages in that too large an amount is assessed against appellants, and that said finding in favor of appellee and against appellants is contrary to the evidence."

We will dispose of the various specifications of this assignment of errors in the order in which they appear herein:

The statute permits a complaint to be tested for the first time upon appeal for one cause only, that is, that the complaint does not state facts sufficient to constitute a cause of action. Appellants' whole argument is upon the ground that there is a defect of parties plaintiff. Such a defect is not presented by the first specification of appellants' assignment of errors.

The second specification, if proper, is waived by a failure to discuss it.

The third specification presents no question to this court.

As to the fourth specification, it may be said that the lower court overruled appellee's demurrer to appellants' answer in abatement, and of such action appellant cannot complain; and if the court erred in finding against the appellant upon the issue tendered by such answer the error is not properly assigned here.

The fifth specification of the assignment of error presents the question of the sufficiency of the complaint. It is not contended by appellants that the first reason assigned in the

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demurrer should be sustained, nor that the second reason attacking the jurisdiction of the lower court is good, but that the lower court should have sustained the demurrer to the complaint for the third reason assigned, which was, in the language of the demurrer, as follows: "That there is a deficit of parties plaintiff in this, that Benj. F. Hayes sheriff of Lake county, Indiana, to whom said bond was payable, is a necessary party plaintiff and should be joined herein." It is well settled in this State that an assignment of a judgment will vest an equitable title in the assignee, and that the assignee thereby becomes the real party in interest in any proceedings which may be commenced for the collection or protection of such judgment. *Thomas v. Irwin*, 90 Ind. 557; *Lapping v. Duffy*, 47 Ind. 51; *Shirts v. Irons*, 54 Ind. 13; *Kelley v. Love*, 35 Ind. 106.

It may be further said that the property upon which the execution was levied was the fund to which appellee must look for the payment of the judgment, and that appellee had an interest in its preservation; that, in fact, the bond in suit, which was executed to the sheriff and the owners of the property levied upon, was for the benefit of appellee, and he would have a right to an action upon it. Such is the effect of the decision in the case of *Thomas v. Irwin*, 90 Ind. 557. See, also, *Moore v. Jackson*, 35 Ind. 360.

The question then remains, can the action be prosecuted by appellee without joining the sheriff as plaintiff, or, if he refuse to join as plaintiff, then as defendant. In none of the appealed cases in this State has the question thus presented been decided. The case of *Pipher v. Johnson*, 108 Ind. 401, is not in point, and the syllabus does not state the rule of law announced in the opinion. The case of *Walls v. Johnson*, 16 Ind. 374, holds that a judgment creditor may join with the sheriff in an action on a replevin bond although he is not a party to the original suit. No other question as to the complaint was before the Supreme Court in the last mentioned case. In the case of *Fos-*

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ter v. Bringham, 99 Ind. 505, this question was attempted to be raised, but the court held that the defect, if any, of parties plaintiff was waived by failure of the defendants to assign such reason in their demurrer to the complaint. The three cases last mentioned are the only cases cited by counsel for appellant to sustain their contention.

Our statute requires that all actions shall be brought in the name of the real party in interest. §251 Burns 1894. It has been often held that a person for whose benefit a contract has been made can maintain an action thereon in his own name. *Waterman v. Morgan*, 114 Ind. 237; *Williams v. Markland*, 15 Ind. App. 669; *Young v. Young*, 21 Ind. App. 509. There can be no doubt but that the bond in this cause was given for the benefit of the owner of the judgment, for the payment of which judgment the replevied chattels were being held by the sheriff at the time they were taken from him. The sheriff held the property by virtue of his levy and in no other way; he could occupy no better position than trustee for appellee. We see no good reason why appellee alone could not maintain this action upon the replevin bond for the recovery of whatever was due him by its terms.

Appellants' sixth specification of error is not available. The assignment is joint, and if either paragraph of answer is bad the error, if any, is not presented. The record shows that the court overruled appellee's demurrer to the third paragraph of appellants' answer. Appellant could not complain of the action of the lower court in this regard. This specification is not available for another reason. The record as it comes to us does not contain the demurrers filed by appellee to the various paragraphs of answer filed by appellants; on the contrary, it affirmatively shows that no such demurrers are on file in the clerk's office of Lake county where the cause was commenced and prosecuted to final judgment.

Specification seven presents no question. There was a general verdict in this cause. Specification nine presents the

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question as to the overruling of appellants' motion for a new trial. It is contended by appellants that the lower court erred in admitting evidence of the value of the mare "Mrs. Murray" when it was shown that the mare had died a natural death after she was taken by appellants. The evidence admitted was as to the value of this mare at the time she was taken by appellants, and the court admitted evidence of her death before the commencement of this action. There is nothing in the judgment in this cause to indicate that the court considered the value of this mare in arriving at the amount of the judgment, there being no special finding, and the evidence, although conflicting, being such that the court could have rendered the judgment herein and given appellants full credit for the value of said mare. We do not think the court erred in admitting the evidence complained of, but, in any event, it was harmless.

It is also contended that the judgment is erroneous being too large; that the lower court gave appellee judgment for the costs in the case of *Sample v. Conroy*. It will be remembered that appellee is the assignee of the judgment in the case of *Sample v. Conroy*. *Hays v. Boyer*, 59 Ind. 341; *Goodwin v. Smith*, 68 Ind. 301. Without passing upon the question as to the right of appellee to recover the above mentioned costs in this case, it is sufficient to say that the judgment does not show that such costs were included.

The ninth specification of the assignment of errors is waived by failure to discuss it.

The tenth is not predicated upon any motion shown by the record, and is not properly assignable as error in this court. The same may be said of the eleventh and twelfth specifications, parts of which are properly assignable as reasons for a new trial.

We find no available error in the record. Judgment affirmed.

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IBACH v. HUNTINGTON LIGHT AND FUEL COMPANY.

[No. 2,792. Filed November 17, 1899.]

NATURAL GAS.—Negligence.—Complaint.—Contributory Negligence.—

A complaint in an action against a natural gas company for damages to plaintiff's house caused by an overheated stove alleged that plaintiff had control of all gas appliances within her home, except the mixer, that defendant over plaintiff's protest substituted a number seven for a number five mixer, but did not show that defendant was bound to furnish such mixer as the consumer wished, or that the fire might not have occurred with either mixer; that a valve was placed in the pipe to regulate the flow of gas, but that the amount of the flow depended entirely upon the pressure, which was regulated by the company; that the "valve was used to turn off and put on the gas," and that "she had carefully adjusted the valve to suit the pressure before her absence." *Held*, that the complaint fails to show any negligence on the part of defendant, and also fails to show that plaintiff was free from fault.

From the Huntington Circuit Court. *Affirmed*.

B. F. Ibach, J. G. Ibach, J. C. Branyan and B. M. Cobb, for appellant.

O. W. Whitelock, S. E. Cook, J. B. Kenner and U. S. Lesh, for appellee.

ROBINSON, J.—Appellant avers in her complaint that the city of Huntington granted appellee the use of its streets to lay mains to furnish natural gas to the citizens of such city, the consumer to pay appellee according to the number of the mixer to be used; that appellee retained the control of and directed the use of the mixer, which is an instrument regulating the flow of gas at the point where used for fuel; that under the supervision of appellee she had her residence supplied with pipes, and that appellee attached the same to its main in the street along appellant's property, and attached the same to a heating stove used by her for heating purposes; that the arrangement for using gas was by placing an instrument called a mixer at the end of the supply pipe at a point near where the gas enters an appliance known as a burner,

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being so arranged that the gas passes out of the pipe through the mixer into the burner, and "in the pipe before the point where gas passes through the mixer is placed a valve which is opened and closed to regulate the flow of gas, but the amount of the flow of gas depends upon the pressure entirely, which pressure is regulated by appellee" and is not and can not be controlled by the consumer; that the valve does not control the heat created by the burning of the gas, but that that depends on the pressure and size of mixer; that the "valve is used to turn off and put on the gas; the heat supplied depends on the pressure furnished by the company; that a valve may be wide open and but a slight flow of gas and small heat result, according to the pressure, or it may be almost closed and owing to the pressure and size of the mixer great and dangerous heat follows, which she did not know;" that a number five mixer if the valve was wide open did not create a large, excessive, and dangerous heat at any pressure furnished by appellee; that on the —— day of November, 1895, she was using a number seven mixer with the valve slightly turned on and a small quantity of heat with no danger of excessive heat, as she had done with a number five mixer, and she believed, as appellee had assured her it was safe, that she could use it as she had used the number five; that appellee, knowing that sometimes pressure was increased without the consumer's knowledge, provided no means by which the consumer would be advised of such increase, and had no arrangement connected with the mixer or valve to regulate the flow of gas and avoid dangerous and excessive heat in the absence of the consumer; that appellant had for a number of years used a number five mixer, which remained the property of appellee, and over which she had no control, and which was of sufficient capacity to furnish all the heat required without excessive heat, which appellee knew, and if in her absence the pressure increased there was no danger of excessive heat; that without the request and over the protest of appellant, appel-

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lee took out the number five mixer and replaced it with a number seven mixer which supplied a larger volume of fuel, which replacing was done for the sole purpose of increasing the revenues of appellee, as by its franchise appellee was permitted to charge according to the size of the mixer in use; that the number seven mixer furnished too much fuel, and she requested it to be replaced with the one removed, and refused to pay the extra charge, and upon such refusal appellee threatened to take out the mixer and cut off her supply of gas, and being then in feeble health and having no other means to heat her house she was compelled to use the mixer; "that she did not know neither had she the means of knowing that said number seven mixer was furnishing too much gas for the capacity of her stove;" that she "was not instructed how she should use said mixer so as to check any excess of heat, and she did not know that the said mixer required different management from that of the one theretofore used, or that if an increase of pressure arose in her absence the same would set fire to her house;" that appellee knew the number five mixer had been used in the same stove and at the same place for one year with safety, and without overheating the stove, and that it furnished all the heat necessary for comfort and health; yet knowing these facts it took out the same and put in the number seven, assuring appellant that the same was known to be safe and was safe, "thereby overloading and overheating the capacity of said stove, and its pipes, thereby setting fire to said residence by the excessive heat produced by the enforced use of said larger mixer;" that by putting in the number seven mixer in place of the number five "by reason of increase of pressure as aforesaid, in her absence, the said residence caught fire by the excessive heat produced (though she had carefully adjusted the valve to suit the pressure before her absence) by which the walls," etc., were burned to her damage.

The only question presented is the sufficiency of the complaint.

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If a company furnishing natural gas to consumers negligently increase the pressure of gas in a consumer's pipe so beyond the accustomed pressure as to overheat the consumer's stove, and set fire to his house, the consumer being without fault, the company is liable for the damages. *Alexandria Mining, etc., Co. v. Painter*, 1 Ind. App. 587; *Indiana, etc., Gas Co. v. New Hampshire Ins. Co.*, *post*, 298.

In the case at bar the complaint fails to make a case within the above rule. Construing the pleading most strongly against the pleader we can but conclude that it fails to show any negligence on appellee's part, and also fails to show appellant free from fault. It appears that appellant had control of all gas appliances within her home except the mixer. Complaint is made that appellee changed, over appellant's protest, a number five for a number seven mixer, but there is nothing to show that appellee was legally bound to furnish such mixer as the consumer wished. So far as we are informed by the complaint, the fire might have occurred with either mixer. It is not shown where the right to determine the size of the mixer lay. Appellee may have had the right under its franchise to require a certain mixer for such a house as appellant's; it may have had a perfect right to change the mixer as it did. It is not claimed the mixer put in was defective, or that any of the appliances were defective. It is not shown that the change was a negligent act, or that appellee did anything wrongful in making the change, or that after the change was made it negligently increased the pressure through such changed mixer. It is averred that the gas passes out of the pipe through the mixer into an instrument called a burner, and in the pipe before the point where the gas passes through the mixer "is placed a valve which is opened and closed to regulate the flow of the gas, but the amount of the flow of gas depends upon the pressure entirely," and that the pressure is regulated by the company. It is also averred that the "valve is used to turn off and put on the gas". Construing these averments together they mean

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that the flow of gas, whether the pressure was great or small, was controlled by this valve. And it seems appellant knew this and acted upon it, and that she also knew the pressure was not uniform for she avers that "she had carefully adjusted the valve to suit the pressure before her absence." If she made a mistake and failed to turn the valve low enough, she can not complain. It is clear from the pleading that she knew the manner of regulating the flow of gas, and made an attempt to regulate it.

The case of *Richmond Gas Co. v. Baker*, 146 Ind. 600, 36 L. R. A. 683, cited by counsel, does not apply. In that case the company used a defective elbow connecting its pipe with a dwelling, which defect it failed to repair, though repeatedly called upon to do so, and it was held that the company was liable for injuries resulting from an explosion of escaping gas, the injured party being without fault. Judgment affirmed.

Wiley, J., took no part in this decision.

OWEN v. RAMSEY ET AL.

No. 2,909. Filed November 17, 1899.]

BROKERS. — Commission. — Sales. — Condition Precedent. — Plaintiff entered into a written agreement with defendant to negotiate the sale of certain bonds which the latter had agreed to take in payment for county work which he had contracted to do, the commission to be paid from the second payment realized from the sale of the bonds. Plaintiff procured a purchaser who was able and willing to buy the bonds under the terms prescribed in the contract, but before the bonds were delivered to plaintiff the sale thereof was declared illegal and perpetually enjoined. *Held*, that plaintiff was not entitled to the commission, since by the contract the payment was made to depend upon a contingency that never arose.

From the Greene Circuit Court. *Affirmed*.

Thomas Van Buskirk, C. E. Davis and W. V. Moffett,
for appellant.

WILEY, J.—Upon petitions filed before the board of commissioners of Greene county such proceedings were had that such board ordered the construction of a system of gravel and macadamized roads. To provide a fund for the payment of the construction of such roads bonds aggregating in excess of \$147,000 were issued by the board, under the provision of the statute. The appellees had been awarded the contract for the construction of the roads, and the county treasurer had sold to them \$147,000 of such bonds at their face value. Upon such sale appellees did not pay the treasurer for such bonds, but took them in payment for the construction of the roads under their contract. Appellees then entered into a written contract with appellant, as a broker, to negotiate the sale of such bonds. The contract specified the terms upon which such bonds were to be sold, and for making such sale appellees were to pay appellant a commission of one-half of one per cent. on the aggregate amount of the sale. This contract contained the following provisions: “That said parties of the first part [appellees] agree that said party of the second part [appellant] shall have the sale of said bonds for ten days * * * on the following terms to wit: \$5,000 of said bonds to be delivered and paid for as soon as the legality of said bonds is established to the satisfaction of the purchasers; \$20,000 payable May 15, 1897.” Then follow the amounts and dates of the remaining payments. The contract further provides that “such party of the second part agrees to deliver said bonds to the purchaser free of expense to said parties of first part. In consideration of which said parties of the first part agree to pay said Thomas C. Owen for making said sale a compensation of one-half of one per cent., to be paid out of the second payment of money realized from such sale of bonds.” Appellant brought this action to recover commission for making the sale of bonds under the contract. The issues were joined by numerous and voluminous pleadings, but as no questions are presented resting upon the pleadings, we do not deem it necessary to set

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them out even in the abstract. Upon proper request, the court made a special finding of facts, and stated its conclusions of law thereon. By its conclusions of law, the court stated that appellant was not entitled to recover. To the conclusions of law the appellant excepted.

While the assignment of errors challenges the ruling of the trial court upon the demurrers to some of the pleadings, the only question discussed is the alleged error of the court in stating its conclusions of law. The appellees have not filed a brief.

A brief statement of the facts found will suffice for a proper determination of the only question for decision. The court found that appellant negotiated a sale of the bonds within the time and upon the terms prescribed under his contract; that the purchasers were ready, willing, and able to comply with the terms of their contract of purchase, and to pay for such bonds, but that they never did pay for the same, nor tender any money, nor offer to pay for them; that the county treasurer had sold said bonds to appellees and others, as contractors, in payment at par of the contract price of constructing said roads, to be delivered as the work progressed, upon proper estimates; that \$7,000 of said bonds had been delivered to appellees; that the remaining bonds were in the possession of the county treasurer; that the said bonds were never delivered to appellant, nor by him to said purchasers, nor were they ever demanded of appellees by appellant; that nothing was ever paid by said purchasers to appellees for said bonds, and no offer was ever made to pay for the same; that after such sale certain taxpayers of the county commenced an action in the circuit court of Greene county to enjoin the delivery of said bonds to appellants and all other persons claiming under them, on the ground that the alleged sale by the treasurer of said bonds to appellees was illegal and void; that appellees appeared to said action and resisted the granting of the injunction prayed for; that said court upon final hearing held said contract of sale illegal and void, and granted said injunction. Upon these facts the

court stated as a conclusion of law that appellant could not recover.

Appellant argues that he performed the service required of him under his contract, i. e., he procured a purchaser for the bonds within the time and upon the terms prescribed; that such purchaser was ready, willing, and able to purchase the same, and pay for them according to the terms of the contract. Having done this, he insists that he earned his commission, and that his right of action can not be defeated by reason of the facts that the sale of the bonds to appellees had been declared illegal and void, and their delivery perpetually enjoined by a judicial proceeding, and the further fact that no payment by reason thereof had ever been made by the purchaser to whom appellant sold. Our attention has been called by counsel in their argument to the line of authorities which declare that where an agent or a broker is employed to make a sale of real estate, or to procure for the owner a purchaser, upon prescribed terms, who is able, willing, and ready to make the purchase, and he performs the service, his right of action for his commission can not be defeated because of the failure of title in the principal. Counsel insist that the rule announced in such cases is applicable here, and is of controlling influence, on the ground that when appellant made his contract with appellees the title to the bonds was in appellees, and, since he performed the services he engaged to perform, he is entitled to recover his commission, notwithstanding the fact that by a judicial determination it was declared that the sale of the bonds to appellees by the treasurer was illegal and void. We do not think the two classes of cases are parallel, and hence the rule that controls the one does not apply to the other.

We can not believe that the decision of the question here presented hinges upon the question of title in or ownership of the bonds, but rather upon the express terms of the contract between the parties. By that contract appellant placed a limitation upon his right of recovery by agreeing that

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payment for his services should be made out of the second payment made upon the sale of the bonds by the purchasers. That provision of the contract was a condition precedent to his right to recover. Suppose he had negotiated a sale of the bonds to a party who at the time was solvent and able to pay for them according to the terms of the contract; that, in pursuance to the contract, the purchaser had made the first payment; that before the second payment became due, by some sudden and unexpected financial reverses he became insolvent, and wholly unable to make the second or any of the subsequent payments, in such case, would appellees be liable to appellant for the commission? Certainly not, and plainly so, because the condition upon which he was to be paid had not been fulfilled. It is not, therefore, a question of failure of title, for it clearly appears from the record that the alleged sale of the bonds to the appellees was illegal and void, and hence the title never vested in them. It is rather a failure of a condition precedent to the appellant's right to recover. The exact question here presented has been decided in at least two states.

In the case of *McPhail v. Buell*, 87 Cal. 115, appellant and appellee entered into a contract by which the latter agreed to pay to the former a commission for negotiating the sale of real estate, such commission to be paid when the purchaser should pay \$20,000 of the purchase money to appellee, and execute notes secured by mortgage for the residue. The sale was made, the notes and mortgage were excuted, but the purchaser failed to pay the \$20,000. Upon these facts it was held that the failure of the purchaser to pay the money was a complete bar to any claim of the appellant for commissions.

In *Manton v. Cabot*, 4 Hun 73, 6 Thompson & Cook 203, appellant sued upon the following contract: "Mr. Joseph P. Manton. Sir: Provided you obtain for us a contract, for 600 tons more or less of horse railroad rail (said contract to be accepted by us), we hereby agree to pay you as fast as

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our pay is obtained, all the price you obtain for the said iron over and above \$81.50 per gross ton. Cabot & Co." Appellant obtained a contract for 600 tons of rails, more or less, at \$90 per ton, "one-quarter cash, three-eighths in thirty and sixty days, interest added," with notes and satisfactory indorsements to appellees, "each lot to be settled for as delivered, on the basis of cash and time." Some 524 tons of the iron was delivered under the contract, such delivery being made from time to time, and payments made aggregating about \$60 per ton. Before all the iron was delivered the purchasers failed and did not make any further payments. It was held that appellant was entitled to receive and appellee was bound to pay him as fast as their pay was received all the price obtained for the iron over and above \$81.50 per gross ton. The court said: "He was entitled to nothing until defendants should receive pay from some parcel of the whole at the specified rate they were entitled to per ton. As fast as a parcel of the iron was delivered and paid for in full, plaintiff's right to the excess beyond \$81.50 per ton would become complete and he could demand and was entitled to receive it, whether defendants got pay in full or not for subsequently delivered lots, but, so long as the payments made on the several invoices delivered were only of the first and second instalments of the contract * * * and there was no bad faith on the part of the defendants in the application of the moneys paid, to such instalments, the plaintiff's right was still in abeyance to await the completion of the payment on each parcel, respectively, by the purchaser. It appearing without dispute, therefore, that no amount beyond the second and first instalments on any delivery had ever been paid, and that defendants on no single ton of the iron had received \$81.50, but that all beyond the first and second instalments remained unpaid, no right of action had accrued on the contract. The plaintiff's action was premature, for nothing was due him on the contract."

These cases are so strongly in point that it seems to us they

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are of controlling influence here. By his contract with appellees appellant made the payment of his commission to depend upon a contingency. That contingency has not arisen, and when this suit was commenced no right of action had accrued under the contract. The trial court did not err in stating its conclusion of law. Judgment affirmed.

TOWN OF ROCHESTER v. BOWERS.

[No. 2,721. Filed November 21, 1899.]

APPEAL AND ERROR.—Harmless Error.—Pleading.—Where the record affirmatively shows that the judgment was based upon a good paragraph of complaint, available error cannot be predicated upon the ruling of the court on other paragraphs.

From the Fulton Circuit Court. *Affirmed.*

M. A. Baker and *J. H. Bibler*, for appellant.

Enoch Myers, for appellee.

HENLEY, J.—This action was commenced by appellee as plaintiff against appellant as defendant by a complaint in three paragraphs. The appellant demurred to each of the paragraphs of the complaint on the ground that neither of said paragraphs stated facts sufficient to constitute a cause of action, each of which demurrers was severally overruled, and to these rulings of the court, appellant excepted. There was an answer filed in two paragraphs; a reply filed by appellee to the second paragraph of answer; and the cause being put at issue, it was submitted to the court for trial without the intervention of a jury. The finding of the court was in favor of the appellee. The appellant moved for a new trial, which was overruled.

The only question in this court arises upon the ruling of the lower court upon the demurrers to the several paragraphs of the complaint. The first paragraph of complaint was a common count for work and labor done, and was in the following language: "Plaintiff complains of the defendant, the incorporated town of Rochester, Indiana, and says that

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said defendant is indebted to him in the sum of \$193.56 and interest thereon at the rate of six per cent. per annum from May 18, 1896, for work and labor done and performed and for material furnished for said defendant by the plaintiff at the special instance and request of said defendant, an itemized account of which is herewith filed and made a part hereof, marked Exhibit A. That said work and material were reasonably worth the price charged therefor, in the sum of \$225, all of which is due and unpaid, and for which sum, his costs, and all other proper relief, he demands judgment."

It is unnecessary that we set out in this opinion the other paragraphs of the complaint, or enter into a discussion as to their sufficiency. The first paragraph of complaint is undoubtedly good. The record in this case affirmatively shows that the judgment was rendered upon the first paragraph of the complaint. The second and third paragraphs of complaint were founded upon a written contract. The judgment of the court was in the following language: "Come the parties by counsel, and the court being fully advised in the premises finds for the plaintiff that there is due him from the defendant, and unpaid, the sum of \$199.84 on the account sued on, which is collectible with relief from valuation and appraisement laws, and the court renders judgment on the finding. It is therefore considered and adjudged by the court that the plaintiff recover off of and from the defendant the sum of \$199.84, together with his costs and charges in this behalf laid out and expended," etc.

The record in this case affirmatively shows that the judgment is based upon a good paragraph of complaint. Hence the ruling upon the second and third paragraphs, even if they were not sufficient, which we think they were, is harmless. Elliott's App. Proc. §666; *Ryan v. Hurley*, 119 Ind. 115; *Lowry v. Downey*, 150 Ind. 364; *Miller v. Bottenberg*, 144 Ind. 312. It follows from what we have said, that the judgment of the lower court should be affirmed. Judgment affirmed.

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[No. 2,836. Filed November 21, 1899.]

PLEADING.—Demurrer to Counterclaim.—Form of Demurrer.—A demurrer to a counterclaim for the reason "that the same does not state facts sufficient to constitute a good counterclaim against the plaintiff" is improper; the cause of demurrer should be that the pleading does not state facts sufficient to constitute a cause of action. *p. 294.*

APPEAL AND ERROR.—Overruling Joint Demurrer.—Practice.—Available error cannot be predicated upon the action of the court in overruling a demurrer addressed jointly to two paragraphs of a pleading unless both paragraphs are demurrable for the cause assigned against them. *pp. 295, 296.*

SAME.—Record.—Motions and instructions cannot be made a part of the record by order of court after the expiration of the time given to file bill of exceptions. *pp. 296, 297.*

SAME.—Assignment of Error.—Instructions.—An assignment in a motion for a new trial on account of alleged error in giving instructions, directed jointly to a series of instructions, is not available on appeal unless all of the instructions in the series are bad. *p. 297.*

SAME.—Assignment of Error.—Motion for Judgment, Notwithstanding the General Verdict.—An assignment that the court erred in overruling the appellant's motion for judgment on the interrogatories, notwithstanding the general verdict, is improper, under the provisions of §556 Burns 1894, that when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. *p. 297.*

From the Huntington Circuit Court. *Affirmed.*

J. F. France, Z. T. Dungan, O. B. Jameson and F. A. Joss, for appellant.

J. B. Kenner and U. S. Lesh, for appellee.

BLACK, J.—This was an action brought by the appellant against the appellee upon a promissory note for \$670, on which were indorsed credits amounting to \$550.40, the appellant being the payee, and the appellee the maker; and upon the trial of issues formed there was a verdict against the appellant on its complaint and in favor of the appellee for \$300 upon a counterclaim.

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The answer was in three paragraphs, the third being a counterclaim. The appellant demurred to the second and third paragraphs of the appellee's answer jointly, "for the reason that neither of said paragraphs contains facts sufficient to constitute a good cause of defense to plaintiff's cause of action." This demurrer having been overruled, the appellee, by leave of court, filed an amended third paragraph of answer, being a counterclaim. To this the appellant demurred, the body of the demurrer being as follows: "Comes now the plaintiff and demurs to the counterclaim of the defendant, for the reason that the same does not state facts sufficient to constitute a good counterclaim against the plaintiff."

In *Campbell v. Routt*, 42 Ind. 410, it was held that a demurrer to a counterclaim assigning that it did not "state facts enough for a counterclaim," stated a cause not known to the statute, and that the cause of demurrer should have been that the pleading did not state facts sufficient to constitute a cause of action. It was said that a demurrer to a complaint assigning for cause that it did not state facts sufficient for a complaint would be quite as appropriate as a demurrer to a counterclaim because it did not state facts enough for a counterclaim. See *Petty v. Board, etc.*, 70 Ind. 290, 296; *Thomas v. Goodwine*, 88 Ind. 458, 459; *Krathwohl v. Dawson*, 140 Ind. 1; *Campbell v. Campbell*, 121 Ind. 178; *Wade v. Huber*, 10 Ind. App. 417; *Branham v. Johnson*, 62 Ind. 259; *Grubbs v. King*, 117 Ind. 243; *Peden v. Mail*, 118 Ind. 556. Upon the authorities, the action of the court in overruling the demurrer to the amended counterclaim can not be regarded as erroneous.

A pleading cannot perform the double office of an answer in bar and a counterclaim. *Schee v. McQuilken*, 59 Ind. 269; *Wilson v. Carpenter*, 62 Ind. 495; *Blakely v. Boruff*, 71 Ind. 93.

In *Campbell v. Routt*, 42 Ind. 410, the opinion was expressed that no single pleading can be made to perform the

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double function of alleging matter in bar of an action brought by one party, and at the same time of setting up a cause of action in favor of the other. It was said: "The statement of a defense to an action is one thing. The statement of a cause of action in favor of the defendant against the plaintiff in that action is another and very different thing. Whether the pleading in any given case is one thing or the other must be determined from the character of the pleading and the averments thereof, but it can not be both. Nor can it assume a protean character, and be one thing or the other as the varying circumstances in the progress of a cause may make it best subserve the interests of one or the other of the parties. If the pleading alleges facts arising out of, or connected with, the cause of action, as the foundation of a claim in favor of the defendant against the plaintiff, and claims a judgment for damages in favor of the defendant against the plaintiff, or for other affirmative relief, the pleading must be regarded as a counterclaim and nothing else."

The third paragraph of the appellee's answer, in its original condition as well as in its amended form, was a pleading which the case last cited, in the language above quoted, would require us to regard as "a counterclaim and nothing else."

A form of demurrer appropriate to an answer in bar would not be appropriate to the third paragraph of answer, but in the demurrer addressed to the second and third paragraphs jointly the single ground of demurrer was directed against both of the paragraphs, and if sufficient as against an answer in bar, it plainly was not sufficient as against a counterclaim. The demurrer being addressed to the second and third paragraphs jointly, we could not hold the overruling thereof to have been erroneous, unless we could pronounce both paragraphs demurrable for the cause assigned against both. The third paragraph was amended, and thereafter in the progress of the cause the amended paragraph, and not the original, was the counterclaim before the court

and jury. We need not determine whether or not we could examine the original paragraph with the purpose of inquiring as to its sufficiency when attacked by a demurrer sufficient in form to raise the question as to the sufficiency of both paragraphs. There was no available error in the overruling of the demurrers.

One of the specifications in the appellant's assignment of errors is, that the court erred "in overruling the motion in arrest of judgment;" but counsel have not pointed out such a motion in the transcript, and upon examination we fail to find such a motion in the record.

It is assigned that the court erred "in refusing to strike out Exhibit A to the counterclaim." This motion is not made a part of the record by bill of exceptions. It is claimed that it was brought into the record by order of court. The motion was overruled November 20, 1897, at the September term, 1897, of the court below, and the court then gave sixty days to file bill of exceptions. The final judgment was rendered later in the same term, and thereafter, at the same term, was filed a motion for a new trial, which was overruled at the January term, 1898, and the court gave ninety days for filing bill of exceptions. At the April term, 1898, as shown by the transcript in the form of an entry of the 14th of April, 1898, "on motion, all motions, interrogatories, instructions to the jury, and orders relating thereto and rulings of the court thereon, are ordered to be made a part of the record in this cause, without bill of exceptions, the instructions to the jury being in the words and figures following." Then follow a number of pages of instructions, after the end of which is an entry of the filing of the appeal bond. If refusing to strike out the exhibit could be available error, it is plainly manifest that the motion to strike out was not saved for our notice. And the same may be said of the instructions. If instructions may at any time be thus made part of the record, the court had lost control of the case for such purposes. If the instruc-

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tions could themselves be regarded as in the record, the exceptions noted at the ends of the instructions in the transcript are signed, not by the judge, but by the attorneys for the plaintiff.

In the motion of the appellant for a new trial, it was assigned as one of the causes that the court erred in giving to the jury "instructions asked by the defendant numbered one, two, three, three and one-half, four, five, six, seven, eight." It was not assigned as cause that the court erred in giving any instruction upon its own motion; therefore objection in argument to an instruction so given can not be noticed here. And if the instructions were in the record, we could not notice the argument directed to the giving of some of the instructions asked by the defendant, but not to all, the assignment of cause in the motion being directed, as shown above, to such instructions jointly. See *Harrod v. State ex rel.* (Ind. App.), 55 N. E. 242.

One of the specifications in the assignment of errors is that the court erred in overruling the appellant's motion for judgment "on the interrogatories," notwithstanding the general verdict. Counsel have not referred in their briefs to any place in the record where any motion for judgment may be found. The statute provides, §556 Burns 1894, §547 Horner 1897, that when "the special finding of facts" is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

If the motion were such as is designated in the assignment of error, it would not be in proper form; if it were materially different, the assignment of error would not apply to it. However, in the meager discussion in argument (which it would not be profitable to recite) of three of the interrogatories and the answers thereto, we could find no sufficient reason for disturbing the result reached in the court below. Judgment affirmed.

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THE INDIANA NATURAL AND ILLUMINATING GAS COMPANY v. THE NEW HAMPSHIRE FIRE INSURANCE COMPANY.

[No. 2,747. Filed April 19, 1899. Rehearing denied Nov. 21, 1899.]

NATURAL GAS.—Negligence of Company.—Insurance.—A complaint by an insurance company against a natural gas company, charging that certain property insured by plaintiff was destroyed by fire by reason of the carelessness and negligence of defendant in failing to provide a night watchman to control the supply of gas, without fault of the owner, and that plaintiff had paid the loss and had been subrogated to the rights of the owner, states a cause of action. *pp. 298-300.*

EVIDENCE.—Natural Gas.—Negligence of Company.—In an action against a natural gas company for damage to property by fire caused by an overheated stove on account of the alleged negligence of defendant in failing properly to regulate the supply of gas, proof that on the night of the fire other consumers noticed that their stoves were overheated was improperly admitted, where it was shown that the mixers furnished consumers were of different sizes, some admitting more gas than others, and that there was a key under the control of each consumer with which he could regulate the flow of gas into his stove and turn it off entirely. *pp. 301-305.*

From the Montgomery Circuit Court. *Reversed.*

Benj. Crane and *A. B. Anderson*, for appellant.

A. D. Thomas and *W. T. Whittington*, for appellee.

WILEY, J.—Appellee was plaintiff below, and, from its complaint, it appears that appellee was an insurance company engaged in the business of insuring property against loss by fire, and had issued a policy of insurance upon certain property belonging to one Patrick Slattery. Appellant was engaged in furnishing natural gas for heating and illuminating purposes, and said Slattery was one of its patrons. The property which appellee had insured was a house and household furniture.

It was charged in the complaint that within a few days prior to June 7, 1897, appellant, in the exercise of due care,

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had been accustomed to, and did, keep a watchman during the night, which was necessary to prevent accidents and the communication of fire to buildings into which gas was conveyed and supplied, and whose duty it was to observe and regulate, through proper machinery and appliances, the pressure and supply of natural gas, so that the pressure and supply would not become too great during the night, and thereby prevent excessive and over-heating of stoves, and thereby to prevent the communication of fire by such excessive heating to buildings, etc. That on June 7, 1897, appellant carelessly and negligently failed to keep such watchman on guard and duty, and, in consequence thereof, the pressure and supply of gas became very great and excessive, and beyond all reasonable demand; that thereby the supply of gas in the cooking stove in the dwelling-house of said Slattery became so great and excessive during the night, when the members of his family were asleep, that it communicated fire to said dwelling, burning the same and its contents, and that by reason thereof appellee was compelled to, and did, pay to said Slattery, on account of said insurance policy, the damage to his said property occasioned by said fire, in the sum of \$470.16; that said fire and damage were caused without any fault or negligence of appellee or said Slattery, and wholly on account of the negligence and fault of appellant, in not having and keeping a watchman on guard as aforesaid. It further appears from the complaint that in said insurance policy there was a clause which provided that if appellee claimed that the fire was caused by the act or negligence of any other person, or corporation, then on payment of the loss by appellee, it should be subrogated to all right of recovery by the insured, and that the insured should assign such right to appellee; that said Slattery did, at the time of the payment of the loss to him, make such assignment. The clause in the policy to which we have referred, and the assignment of Slattery, are copied bodily into the complaint. Slattery was made a party defendant to answer as to his interest, if any, and suffered a default.

Appellant demurred to the complaint for want of sufficient facts, which demurrer was overruled. The case was put at issue by an answer in general denial, trial by jury, and a general verdict for appellee. Appellant's motion for a new trial was overruled, and, by its assignment of errors, the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial, are respectively challenged.

The right to maintain the character of an action declared upon in the complaint is clearly recognized in this and other states. In *Phoenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405, the subject is ably discussed and authorities collected.

Appellant's learned counsel, in their brief, have not, in our judgment, pointed out any defects in the complaint. This court in *Alexandria Mining, etc., Co. v. Painter*, 1 Ind. App. 587, held, and correctly, as we think, that a company, or corporation, which furnishes natural gas to consumers, and negligently increases the pressure of gas in the consumer's pipe so beyond the accustomed pressure that it overheats the stove of the consumer, and without his fault sets fire to his property and destroys it, he may recover damages occasioned thereby. And as an insurance company which has paid the loss may be subrogated to the right of the consumer, it may recover the amount required to be paid by it under its policy.

The complaint before us states a cause of action, in that it shows that appellee had insured Slattery's property; that it was destroyed by the carelessness and negligence of appellant, without any fault of Slattery or appellee; that it had paid the loss, and had been subrogated to the rights of Slattery. The complaint charges that appellant negligently failed to provide a watchman at night, so that he might control the increase and supply of gas, and that the services of such watchman were necessary for that purpose. The demurrer to the complaint was properly overruled.

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This leaves for our consideration the questions presented by appellant's motion for a new trial. The motion for a new trial is based on alleged errors in admitting and rejecting certain evidence, and in giving and in refusing to give certain instructions, and that the verdict is contrary to law, and not sustained by sufficient evidence.

As to whether Slattery's property was destroyed by overheating the stove and pipe, occasioned by excessive pressure and supply of gas, or by reason of a defectively constructed stove-pipe and flue, is a disputed question of fact; and as there is evidence in the record which supports the conclusion reached by the jury, to wit, that the fire was occasioned by the latter means, we cannot disturb the verdict on the evidence. The evidence shows that Slattery's property, which was destroyed by fire, was in the city of Crawfordsville, and that appellant piped to said city gas for use by its patrons and consumers, from the gas fields near Noblesville; that it was conveyed through an eight inch main, and that the pressure was uniform to all consumers. Appellee introduced a number of witnesses residing in different parts of said city of Crawfordsville, who were patrons of appellant, to prove that on the night Slattery's property was burned, their stoves became unusually hot about the time the fire at Slattery's occurred. To all this evidence, appellant objected, and over its objection, the court admitted it.

It will be unnecessary to set out or refer to all such evidence, for it is all of the same character in effect, and the examination of the evidence of one of the witnesses upon the subject will suffice. Michael Collins was called as a witness by appellee. After directing his attention to the night of the fire at Slattery's, he was asked and answered the following questions: "Q. I will ask you if you remember that night about the fire and alarms that were given? A. Yes sir. Q. I will ask if you observed that night your stove, did you see your stove at any time during that night after 12 o'clock, or at any time? A. Between one and two

o'clock. Q. What was the condition as to shedding heat or otherwise?" To this last question, appellant objected, and the objection is fully stated in the record. The objection was overruled, and the witness answered: "Oh yes, it was pretty warm." By other questions and answers, it was shown that the stove was red hot. Appellant urges that the question it objected to was an improper one, because it was an inquiry in reference to another transaction, place, and fire, and for the further reason that the means through which gas is distributed is under the immediate control of the person or persons using it, by reason of which there could be no question made as to whether the fire occurred under the same circumstances and at the same time mentioned in the complaint. It was said in *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57: "The correctness of a ruling on the admission or exclusion of evidence depends, in a large measure, upon the issues, and the other evidence then in hand." In the case we are considering, the controlling issue, or question, was the alleged negligence of appellant in permitting an unreasonable and unnecessary pressure of gas to flow, resulting in the damage complained of. Upon this question, appellee had the burden, and it was bound to prove, to make out its case, such alleged negligence. It was in evidence that the pressure of gas throughout the city of Crawfordsville was uniform; that the pressure was controlled and regulated by automatic machinery and appliances at two different stations, one immediately outside the limits of the city, and the other within the city; that for a long time before the fire, appellant had kept a night watchman, whose duty it was to attend the machinery and control the pressure of gas; that the services of such watchman were necessary to that end; that a short time before the fire, his services in that regard were dispensed with, and that at the time of the fire there was no such watchman on duty. It was also in evidence that the "mixers" in their undisturbed or natural conditions were not of the same size, and that some of them

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would admit more gas than others. While the evidence shows that the supply of gas in the mains and the several branches thereof was under the management and control of appellant, yet it is shown that at each stove or place of using, there was a key under the management and control of the consumer, by which he could regulate the flow of gas into his stove, or other place of consumption, and could turn it off entirely. With this issue and the facts before us, we are to determine the correctness of the ruling of the trial court in admitting the evidence complained of. In the discussion by counsel, we are referred to the rule in actions against railroad companies for negligence in destroying property by fire, that it is proper to admit evidence as to other and distinct fires, originating from passing locomotives. That rule is bottomed upon the supposed unity of management and similarity in the construction of engines, and has been held admissible as tending to prove the possibility and a consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. This was the reasoning by the Supreme Court of the United States in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, and has been followed in this State. *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98. See, also, *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, and cases cited.

It does not seem to us that the rule declared in fire cases against railroad companies, and that contended for by appellee, are at all parallel, or based upon the same principles. The same reasoning will not apply, for the reason they are not founded upon the same basis. The difference to our minds is clear and marked. In the class of railroad cases referred to, the company owns and controls the right of way, and is charged with the duty of keeping and maintaining such right of way in a reasonably safe condition. It also owns, runs and operates its locomotives. It is required, in the discharge of its duty to the public, and others, to use

machinery of approved patterns in all their appointments, and to keep the same in reasonable repair. No one save the servants and agents of the company has any control, management or supervision of the right of way, its locomotives, or machinery. Not so in the use of natural gas. In the first instance, it is under the management and control of the company that furnishes it to the consumer. The company conducts it in mains and branches to the point where it is used, and to that point it has absolute control of the pressure and supply. For one consumer, it furnishes a certain "mixer" of a given capacity, and for another, a "mixer" of a different capacity. In each instance a key is attached whereby the consumer is given absolute control over the flow of gas. He can shut it off entirely, or regulate its flow and supply at will. The gas used by the consumer is used upon his own premises, and aside from the general pressure and supply furnished by the company, the company has no more control over it than a stranger. At any time a stove might become overheated by turning the key so as to admit of the full pressure of gas. Another fact, to which we can not close our eyes, because it is one of common knowledge and every day experience, is, that during the night, when many gas fires are shut off, or turned down low, the general pressure increases. Of the several witnesses who were permitted to testify to the condition in which they found their stoves on the night of the Slattery fire, in no one instance was it shown what character or size of "mixer" was used, or whether the gas was turned partially off by their respective keys, or whether they were burning the full volume of gas, which would flow through their burners uncontrolled by the key, or whether their connecting or distributing pipes were the same, etc. The mere fact that other stoves in other parts of the city, receiving their supply of gas from the same source, were on the night of the Slattery fire, red hot and dangerous, cannot be legitimately considered as having any bearing upon the question we are considering, at least, until it is first

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shown that the conditions were the same as those of the Slattery stove. This exact question was decided by this court in the case of *Washington Township, etc., Co. v. McCormick*, 19 Ind. App. 663. Robinson, J., wrote the opinion of the court in that case, in which he collected many authorities, and the conclusion reached is supported by all the adjudicated cases, and the reasoning is so clear and strong that it becomes convincing. We cannot add anything to what was there said, and feel fully justified and contented by citing that case and the cases therein cited as controlling the question here discussed.

If the conditions as to the stoves of all the witnesses were the same as compared to the stove of Slattery, i. e., if the "mixers" were the same, and the keys were all turned so as to admit of the same supply of gas, and the pipes and connections were the same, then a different question would be presented, and it would rest upon a different principle; but that question is not before us for decision, and we express no opinion. Under these facts, and the rules of evidence established by text writers and the authorities, the evidence complained of was incompetent, and it was error to admit it. Other questions are discussed, arising under the motion for a new trial, but under the conclusion we have reached on the admission of the evidence discussed, they are not likely to arise again, and they need not here be decided.

For the error pointed out, the judgment is reversed, with instructions to the court below to grant appellant a new trial.

HENRY v. MOBERLY.

[No. 2,274. Filed Nov. 1, 1898. Rehearing denied Nov. 21, 1899.]

LIBEL.—Privileged Communication.—Notice.—Complaint.—Evidence.
—In an action for libel, based upon a privileged communication, the burden is upon plaintiff to allege and prove that the publication was malicious and without probable cause. *pp. 311, 313.*

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LIBEL.—Malice.—Evidence.—Privileged Communication.—Where an action for libel is based upon a privileged communication, proof of the falsity of the charge made in the communication is not of itself sufficient to show malice. *p. 316.*

SAME.—Privileged Communication.—Falsity of Charge.—To entitle plaintiff to recover in an action for libel, based upon charges made in a privileged communication, it must be shown that the charges were false, and that defendant knew them to be false at the time he made them. *pp. 316-318.*

SAME.—Damages.—Where, in an action for libel, based upon a communication made by a school trustee to his associates protesting against the employment of plaintiff as teacher, it was shown that plaintiff was employed, notwithstanding such protest, and without any financial loss, and that the charges were not communicated to any other persons, she was not entitled to more than nominal damages. *p. 318.*

From the Clay Circuit Court. *Reversed.*

W. R. Harrison, J. C. Robinson, G. A. Knight, Willis Hickam and J. A. McNutt, for appellant.

I. H. Fowler, L. U. Dorney, J. R. East and Holliday & Byrd, for appellee.

WILEY, J.—In June, 1889, appellant was a member of the board of school trustees of the town of Gosport, and was its treasurer, and had been for many years prior thereto. Appellee had been employed by said school trustees as a teacher in the public school of said town, and did teach therein during the school year of 1888 and 1889.

At a meeting of the board held on the 21st day of June, 1889, called specially to consider the application of appellee to be reëmployed for the next ensuing school year as a teacher, appellant, as a member of said board, filed a written protest against so employing appellee. The majority of said board refused to consider the objections therein urged to her employment, and did favorably consider appellee's application, and did contract with her to teach in said school for the next ensuing year. After such protest was filed, and appellee was reëmployed as indicated, appellant withdrew the protest filed by him, and locked it up in his safe until he was re-

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quired by the court to produce it for inspection. Appellant did not publish or circulate said protest in any way other than to submit it to said school trustees, and when it was submitted no one was present but the three members of said board. It appears from the record that at a previous meeting of said board, appellant stated his objections to the reëmployment of appellee, which objections were stated orally, and were essentially the same as those embraced in the written protest filed June 21, '89, and, at the request of the other two members of the said board, appellant reduced his objections to writing.

The "protest", as it is designated in the record, is quite lengthy, but as only a certain part of it is relied upon as libelous, we need not set it out in full in this opinion. It is headed as follows: "Gosport, Ind., June 21, 1899. George P. Lee, President, A. H. Wampler, Sec'y, Gosport School Board. Gentlemen: I, James R. Henry, treasurer of said school board, submit the following as my protest against the employment of Mary Moberly as teacher in Gosport school for the ensuing year."

In this protest the appellant stated seven different reasons why he objected to the employment of appellee, the second of which is as follows: "(2) For claiming wages not due her, and in making statements, which, in my opinion, she knew to be false, in order to obtain them."

Upon this language in the protest appellee sued appellant for libel, and charged in her complaint that said language was uttered and published by filing it with said board, etc. In the publication of these words the complaint avers that they were false and libelous and without probable cause, and in the language of the complaint "Thereby charging and intending to charge that said plaintiff [appellee] * * * had wilfully and corruptly lied concerning the amount of money due her, and that she was a liar."

The cause was put at issue by an answer admitting the publication of the words charged, but averring that they

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were true, and reply in general denial. In other words the answer was a justification. Appellant's motions for judgment in his favor on the special verdict, that the court render judgment in favor of appellee for nominal damages only; and for a new trial, were respectively overruled, and proper exceptions reserved.

The assignment of errors challenges these several rulings, also the overruling of appellant's demurrer to the complaint and the sufficiency of the complaint.

This is the second appeal in this case. See *Henry v. Moberly*, 6 Ind. App. 490. In the former appeal this court held that the communication or the "protest" sued upon was privileged. In the former appeal the judgment was reversed because of the insufficiency of the complaint. The complaint was then amended, and appellant again urges that it is still insufficient; but upon a careful examination of the opinion upon the former appeal, we think that the objections urged against the complaint are obviated by the amendments, and substantially conform to the rule announced therein. Hence the rule applies that the law as declared in the former appeal is the law of the case in a subsequent appeal. There was no error in overruling the demurrer to the amended complaint.

The other alleged errors may be considered together. Before further discussing the questions involved, we deem it proper to state in narrative form the material facts as shown by the special verdict. The jury found that appellee was a school teacher; that she had taught in the public schools of the town of Gosport for the two school years immediately preceding June 20, 1889; that she was duly licensed to teach the ensuing year; that the school board of said town was composed of George P. Lee, A. H. Wampler, and appellant; that Lee was president, Wampler secretary, and appellant treasurer of said board; that on the evening of June 20, 1889, a majority of said board voted to employ appellee as such teacher for the ensuing year; that

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appellant voted for another person for the same position; that at said meeting appellant stated orally to said board his objections to the employment of appellee; that thereupon Wampler and Lee requested appellant to put his objections in writing and present the same at a subsequent meeting; that appellant agreed to do so, and a meeting of said board was called to meet at the residence of Wampler the following day at 1 o'clock p. m. to receive and consider the same; that said board did meet at the time and place designated, in the parlor of the residence of said Wampler; that at said meeting there were no persons present but the members of said board; that when said meeting was called to order, appellant presented his objections in writing; that one of the members read the same to the other members of said board; that the second specification of said protest was as follows: "For claiming wages not due her, and making statements she knew to be false, in order to obtain them"; that by the use of such words appellant intended to charge that appellee wilfully and corruptly lied; that he thus intended to charge that appellant was a liar; that said language so written and published was to gratify a feeling of personal ill-will and revenge entertained by appellant toward appellee; that he wrote and published said language with a corrupt motive to injure the good name of appellee; that he did so in bad faith; that he knew it was untrue; that the words were written and published maliciously to injure the appellee; that the said language was without probable cause; that appellant did not ask or claim of said board more money than was due to her; that at the end of the school year 1888-9, there was due her \$85, which appellant paid to her on or about May 20, 1889; that for teaching in said school, she was to receive \$35 per month; that the language sued on, and contained in the statement filed with said board, was written by appellant for the purpose of reading to Lee and Wampler, as members of said board; that June 21, 1889, had been fixed for finally hearing and determining appellee's application to teach in

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the Gosport schools; that said meeting was called for the express purpose of enabling the appellant to file a written statement of his reasons and objections against the further employment of appellee, and for the purpose of considering the objections by appellant; that the only publication of said objections by appellant was made to said Lee and Wampler, while said school board was in session considering said application; that the sole purpose of appellant in preparing and publishing the language sued on was to make known to the other members of said board his objections to the fitness of appellee so to teach and to prevent her further employment; that said "protest" was prepared by appellant as a member of said school board, and by him delivered to Lee and Wampler, the other two members of the board, while said board was convened, as his protest against the further employment of appellee as a teacher in said school; that the three members of said board were the only persons who saw or heard said instrument when it was so read and published; that before said meeting at which said protest was read, Lee and Wampler had been fully informed as to the contents of the charge sued on; that as soon as said "protest" was so read and published, the said Lee and Wampler at once decided that said charge did not contain anything that affected the character or fitness of appellee to teach in said schools, and did then and there employ her to teach for the ensuing year; that they placed her in said school at the beginning of the following school year; that the language complained of was written and published in reference to the matter of appellee's knowledge, and the claims made by her in reference to the amount of wages claimed by her to be due her at the time of her settlement with appellant as treasurer, at the end of the school year of 1888-9; that immediately after said protest had been published as aforesaid, appellant took the same into his possession, locked it up in a safe in his bank, where it remained until after this action was commenced, when it was produced by order of

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court, and no other person or persons ever saw it; that when appellee made her final settlement with appellant for her salary on or about May 20, 1889, she did not claim or assert that she was to receive more than \$35 per month; and that the instrument containing the language sued on was prepared and published at the request of Lee and Wampler, as members of said board.

It is proper to say here that the complaint does not state any facts that would entitle appellee to special damages, and hence her right to recover must rest upon the general averments of her complaint, and the facts found by the jury, if such facts are within the issues and shown by the evidence.

The language which appellee has made the basis of her action is not libelous *per se*, and only becomes so by reason of the innuendo charged. It having been held in the former appeal, and we think correctly so, that the occasion upon which the language was published was one of qualified privilege, it follows, under the great weight of authorities, that it was necessary for appellee to allege and prove that the publication was malicious and without probable cause, to entitle her to recover. Upon this proposition we cite, without quoting, the case of *Henry v. Moberly*, 6 Ind. App. 490, where in an exhaustive opinion many authorities are collected, and the subject ably discussed. To better understand the merits of the controversy here presented, we deem it necessary to state some facts disclosed by the evidence which do not clearly appear from the special verdict.

The language used in the protest, which appellee has singled out as her cause of action, as claimed by appellant, had its origin in an alleged conversation between appellant and appellee at the former's bank, when she called on him for a final settlement of her salary at the close of the school year 1888-9. Appellant testified that appellee came to his bank to have a settlement; that he looked over her account and told her there was \$85 due her; that she emphatically said "that is not right;" that he said to her that he thought

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he had kept the books right; that he got her former receipts and figured the amount she had already received and showed her that it was \$195; that he put down \$35 and multiplied it by eight; that she then said "\$35 is not right; I am entitled to have more than \$35. I am to have as much as the other teachers;" that he then said to her that she had been employed for \$35 per month and that that was all he was authorized to pay her; that if she was to get any more she would have to see the other trustees, and if they would allow her more, he would pay it; that she said she would go to see the other trustees, and he told her that was all right. He further testified that he asked her if she would take the \$85 then or wait till she saw the other trustees, and that she said "no I will take it now." He also testified that at the time she was angry and excited and as she went out she said it was not right. As to this part of appellant's evidence he was corroborated in every material fact by another witness who heard the conversation between appellant and appellee, and saw her conduct and actions.

Appellee was a witness in her own behalf, and was asked this question: "Now, Miss Moberly, will you tell this jury what you said and what Mr. Henry said to you at that time?" To which she answered: "I went in to draw my money. I said I came down to draw my money. He got the books and came out, and I said how much is coming to me? He figured there a little while, and he said there was \$85 due me. After he figured there a short time, I said to him, how much are you giving me anyway, and he said \$35. Then I said why is it that you can't give me as much as the other teachers. I didn't tell him I wanted more, or any thing of the kind, I just said why is it that you haven't given me as much as the other teachers."

We do not set out this evidence for the purpose of criticising the jury in its findings in regard to what did actually take place, or what was said between appellant and appellee, but to show the ground of the charge of which she com-

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plaints, that appellant accused her of claiming more than was due her and making statements which she knew to be false to obtain it. We might properly say here, that all the other teachers were receiving larger salaries than appellee, which she knew, and that she was to receive \$35 per month, and no more, which fact she knew when she made her final settlement with appellant.

Recurring again to the question of the language sued on as being privileged, we desire to submit some additional observations and cite some authorities bearing upon it. The general rule prevails that where a publication is libelous *per se*, malice is presumed, and proof of it is not necessary to entitle plaintiff to recover. *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 554; *Nolte v. Herter*, 65 Ill. App. 430; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8; *Youmans v. Paine*, 86 Hun, 479; *Dixon v. Allen*, 69 Cal. 527; *Thompson v. Powning*, 15 Nev. 195; *Gaul v. Fleming*, 10 Ind. 253; *Hudson v. Garner*, 22 Mo. 423; *Mousler v. Harding*, 33 Ind. 176; *Byrket v. Monohon*, 7 Blackf. 83, 41 Am. Dec. 212; *Mitchell v. Milholland*, 106 Ill. 175; *Simmons v. Holster*, 13 Minn. 249.

But when the publication is not libelous *per se*, the burden shifts, and the plaintiff must prove malice. In such case there is no presumption of malice, and a recovery can not be had unless malice is proved. And especially is this rule applicable where the publication is privileged. This is the rule, and so held both in England and in this country by an unbroken line of authorities. In a recent case in England it was held that in an action for libel, if the libel was published on a privileged occasion, there must be proof of actual malice, and in the absence of such proof, the defendant was entitled to judgment. *Nevill v. Insurance Co.*, 2 Q. B. (1895) 156, 14 Reports Q. B. App. 587.

In Maine it was held that where the matter complained of is privileged, the burden of proving malice was upon the plaintiff, and that the defendant cannot be called upon to

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show that he was not actuated by malice, until some evidence of malice towards the plaintiff, more than a mere scintilla, has been adduced by the plaintiff. *Bearce v. Bass*, 88 Me. 521.

In New York it was held that a publication being privileged, the plaintiff has the burden of proving malice. *Youmans v. Paine*, 86 Hun, 479.

And in an action for slander, where the rule is the same, where the words spoken were presumptively privileged, the burden is upon the plaintiff to prove that they were maliciously spoken. See, also, *Green v. Meyer*, 44 N. Y. Supp. 81; *Henry v. Moberly*, 6 Ind. App. 490.

The jury did find that the publication by appellant of the language complained of was malicious, and if we were to be guided and controlled by such finding regardless of evidence, it would be the end of the controversy upon this question. We have, however, examined with minuteness and care every word of the evidence, and fail to find a single fact or item of evidence which in the remotest degree shows malice on the part of appellant. The evidence of both appellant and appellee shows that prior to the alleged libel they were on friendly terms; that there had never been any trouble between them; that when appellant, as a member of the school board, visited the school, he visited the room and grade over which appellee had control; that when they met each other they exchanged the common courtesies of such occasions. There is not a word of evidence in the record showing that appellant had previously said or written anything derogatory to the good name and fame of appellee. As we have already said, the publication of the language relied upon was not libelous *per se*, and as the publication was privileged, there was no inference or presumption of malice, but the appellee was bound to prove it to sustain her right of action.

While it is true that the jury found that malice existed, yet there was no evidence from which such fact could pos-

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sibly have been found, and we must conclude that it was found from mere inference or presumption. This being true the verdict cannot stand.

In a well considered case in Kansas, where the complaint alleged that the defendant published a false and malicious libel concerning the plaintiff, setting out the publication complained of, from which it appeared to be *prima facie* privileged, as a report to a Grand Lodge of Odd Fellows justifying a subordinate lodge in expelling a member for perjury, it was held that the burden of proof upon the trial as to whether the defendant was actuated by malice was upon the plaintiff, and that if the plaintiff gave no evidence of express malice, under the allegations of the complaint the defendant was entitled to a verdict. *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384. See, also, *Marks v. Baker*, 28 Minn. 162; *Lathrop v. Hyde*, 25 Wend. (N. Y.), 448; *Fowles v. Bowen*, 30 N. Y. 20.

In Ohio it was held that even a citizen not only had the right, but that it is his duty as a citizen to communicate to the appointing power whatever he knows for good or ill concerning one who is an applicant for a teacher; and that when such communication is made in good faith, the citizen is protected, even though the statements contained in the communication be not true. *Nolan v. Kane*, 13 Ohio C. Ct. 485.

How much more forcibly the rule should apply if the communication is made by a member of the appointing power to associate members thereof, and especially when such communication is made at the request of such associate members. Here we have a member of a school board, having, as we must presume, the good of the schools in view, protesting to his associate members of the board against the employment of a teacher, giving his reasons in writing why he objects to her further employment, and the only publication of his protest was the reading of it on a privileged occasion at a special meeting of the board called for that pur-

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pose, with no one present but the members of the board. There is not a word of evidence, or a circumstance disclosed by the entire record, that appellant acted with malice, nor is there anything to show that he did not act in good faith.

In the case before us the jury found that the charge made by appellant was false. This finding was made upon the uncorroborated evidence of the appellee as against the evidence of appellant corroborated by the evidence of a disinterested witness. The jury being the exclusive judges of the evidence and credibility of the witnesses, both the trial and this court are bound by their finding. But to prove malice, the *onus* being on plaintiff, she would be bound to prove not only the falsity of the charge, but to go further and prove that the qualified privileged communication was maliciously published. While proof of the falsity of the charge may be considered as tending to prove malice, yet the unbroken line of authorities hold that such evidence is not in itself sufficient for that purpose.

What we consider a leading case upon this question is *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846, where many authorities are collected and reviewed, and the subject is carefully and ably considered. With one quotation from that case, we dismiss the subject without further comment. The court said: "Upon a review of the decisions we think the proper rule to be that, while the plaintiff might rely upon the presumption of the falsity of the charges made against him, he is not required to do so, but may introduce affirmative evidence of such falsity in cases where malice must be expressly shown, as a step in the proof of malice; but that the falsity of the charge is not in itself sufficient to establish malice, and only becomes sufficient when coupled with evidence tending to show that the plaintiff made the charges knowing them to be false, or with other evidence tending to show malice."

We next remark, that there is no finding by the jury that the appellant knew at the time he made the charges

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that they were false, and this, under the authorities, is essential.

The verdict being silent upon this important fact is equivalent to a finding upon the question favorable to the appellant. We need not cite authorities in support of a proposition so familiar, and one which has so often been decided by the Supreme and this Court.

The damages claimed by appellee for the alleged libel is for the injury she sustained to her reputation by its publication to two members of the school board, by the appellant, who was their associate in office. They were all engaged in the same public service. It is not claimed that any one else ever heard of the charge after its publication at said meeting, through appellant, and its publication thereafter, if at all, by any person other than appellant, could not make appellant liable. It is not even claimed that its publication resulted in loss of employment or any financial loss. There is no finding by the jury that she sustained any financial loss.

It abundantly appears that Lee and Wampler both requested appellant to reduce his charge to writing for the purpose of having it published to them in their official capacity, and not in their individual capacity, and that it was to be published to them the following day at a special meeting of the school board for that express purpose. This publication was made at a time while the board was further considering appellee's application for employment.

The jury found that appellant filed the protest for the sole and only purpose of preventing appellee's further employment, and that notwithstanding the protest, the other two members of the board, after reading the same, decided in appellee's favor, on the ground that in their judgment the "protest" contained nothing which affected appellee's character or fitness to teach the school. Both the evidence and the verdict show that Lee and Wampler knew every fact stated in the protest, long before it was presented to them

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in writing, and therefore it did not convey to them any new or additional information.

Looking to the evidence, we find that, as soon as it was read, "Lee remarked that he saw nothing in that protest to change his mind, and Mr. Wampler sanctioned him by saying that that was his view of it exactly, and they said Miss Moberly would remain in the school."

It looks to us that if her character or fitness as a teacher were not injured or affected in the minds of Lee and Wampler, the only persons to whom the protest was addressed, or in whose presence it was published, she was not injured in her reputation or character. The attempt of the appellant to prevent the further employment of appellee was futile, and the finding of the jury that his sole object was to prevent such employment, and that she was immediately employed, controvert the idea that she was thereby injured. In fact the jury affirmatively find that she did not suffer injury by finding that she was reemployed. By the publication of the language charged, appellee could not have been brought into public scorn, contempt, or ridicule, because the alleged libel was not given to the public, nor could her reputation have been injured thereby under the facts as found in this case.

This being a privileged communication, appellee was not entitled to recover damages for wounded feelings, distress of mind, humiliation, etc.

Taking the verdict as a whole, it is not sufficient to support a judgment for appellee for more than nominal damages at least, because there is no finding that she was injured by the publication, while it affirmatively appears that she was not injured. We feel, however, that the ends of justice will be best subserved by a new trial.

Judgment reversed, with instructions to the court below to grant a new trial. Comstock and Robinson, JJ., concur in the conclusion. Black, J., dissents.

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CONSOLIDATED STONE COMPANY v. REDMON.

[No. 2,732. Filed November 22, 1899.]

MASTER AND SERVANT.—Negligence.—Complaint.—A complaint alleging that plaintiff was employed by defendant to perform a certain service which was unattended by danger, and that while so employed he was ordered by defendant to perform another and different service, in which he was inexperienced, which was attended by great peril, and that defendant carelessly and negligently failed to instruct him or warn him of such danger, and that such danger was not apparent to an inexperienced person, states a cause of action, and does not show that the servant assumed the risk incident to the employment. *pp. 319-323.*

SPECIAL FINDING.—When in Conflict with General Verdict.—Master and Servant.—Where, in an action for damages for personal injuries received by plaintiff while employed in a quarry, the complaint alleged that plaintiff was employed to do special work as a wheeler, which was not dangerous, and that he was ordered to leave his said employment and work upon a channeling machine, which was dangerous, without any warning of the danger, a special finding that plaintiff was employed to do general work is in conflict with a general verdict for plaintiff, under the allegations of the complaint, and precludes a recovery. *pp. 323-329.*

From the Lawrence Circuit Court. *Reversed.*

M. F. Dunn, for appellant.

J. R. East and *T. J. Brooks*, for appellee.

WILEY, J.—Appellant is a corporation and owns and operates a stone quarry. Appellee was an employe, and while so engaged was injured by appellant's alleged negligence. This action was to recover damages for such injury.

The complaint is in five paragraphs, and each paragraph is voluminous. In the first paragraph it is averred that appellee was employed specially as a "wheeler", whose duty it was to wheel stone, dirt, and rubbish in stripping the same off of the ledges of stone; that in the discharge of the duties of his employment, he was free from danger; that he received \$1.25 per day; that in taking out stone appellant used what is known as a channeler, which was a heavy

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machine run by steam power; that by means of drills working up and down, it cut grooves in stone to the depth of four or five feet; that the drills, weighing six hundred pounds, were set in the machine by means of a chain and pulley at the top, and to adjust such drills safely, it was necessary to elevate them by means of a crank, while another person goes on top of the machine, adjusts the chain on a pulley, and then by reversing the crank the drills are let down into the groove, and to do such work of adjusting on top of such machine requires the service of some one familiar with the running and adjusting of the different parts of the machinery. That appellant was wholly unacquainted and ignorant of the manner of adjusting such drills on the top of said channeler, and did not know of the dangers incident thereto; that he was without experience in such matters, had never had any opportunity of examining or seeing how such matters were done, nor in what place to put his hands to keep them free from danger; that he had never been instructed in such work; that he was wholly without experience, and that appellant knew said fact. That while engaged in the work for which he was employed, he was "by the defendant, its agents and servants in charge of said quarry, ordered and directed to leave his said employment, and to go and work upon said channeling machine and to obey the orders of the channeler in charge of such machine, but that in giving said order, the defendant and its agents in charge of said quarry and machinery, carelessly and negligently failed in any manner to instruct the plaintiff as to the dangers of the new situation in working on said channeler and in adjusting the drills thereof in order to perform the work required of him, and until up to the time of his injuries * * * the said defendant had wholly failed in any manner to give him any instruction whatever or to explain in any manner the dangers attending upon such duties." That under his new duties, it became necessary for him, without direct orders from any one, and without such orders he did go upon

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the top of said machine and fasten or adjust such drills preparatory to letting them down into the grooves; that he fastened the chain upon the pulley with his left hand and held himself upon the machine with his right hand; that by reason of his ignorance of such work and the danger incident thereto, he placed his right hand in such a position on the top of the channeler, that should the drills suddenly fall, the chain holding them would fall on his right arm, and had his arm in such position for one second only; that there was nothing in the appearance of such channeler, machinery, etc., indicating such drills would suddenly fall; that he used his eyesight, mind, and other faculties to determine if there was any danger; that he could see no danger; that he used great care and caution in performing his duties, notwithstanding which the drill and chain attached thereto suddenly and instantly fell, caught his right arm, mashed and mangled it, so that it had to be amputated, etc. This paragraph concludes as follows: "All of which injuries he says he received on account of the sole negligence of the defendant in its ordering plaintiff from a safe place to one of extra hazard, the work and duties required in adjusting such drills being unsafe and dangerous to him without experience, and in its negligent failure to warn, instruct, or explain to plaintiff the dangers of operating such channeler, and the drills thereon." There is also the necessary averment that appellee was without fault or negligence.

The second paragraph has all the averments of the first, and contains the additional averments that the appellant negligently failed to furnish a sufficient number of servants properly and safely to run the channeling machine.

The third paragraph is substantially like the second, except that it charges that appellant's servants in charge of the machine were incompetent, and known to be such by appellant; that such facts were unknown to appellee, and that he was ordered to go upon the machine to adjust the

drills, etc., by one Mitchell, who was in charge thereof, and that said Mitchell struck the drills with a hammer while appellee was so adjusting the drills, when the chain fell and caught his arm.

The fourth paragraph differs from the third in that it is there averred that the channeling machine was defective, both as to its cogs and pulleys; that appellant knew said fact and that appellee was ignorant thereof.

The fifth paragraph states in substance the same facts as to the alleged negligence of appellant, appellee's freedom from negligence, and that the channeling machine was in charge of one Mitchell, whose orders appellee was bound to obey. It was the intention of the pleader to state facts which would bring this paragraph within the provisions of the act approved March 4, 1893, commonly known as the employers' liability act.

The trial court overruled a demurrer to each of these paragraphs, and appellant excepted. The cause was put at issue by answer in denial. Trial by jury resulted in a general verdict for appellee for \$2,000. With the general verdict the jury returned special findings of fact by way of answers to interrogatories submitted to them. The appellant moved for judgment in its favor on the facts specially found; also moved in arrest of judgment and for a new trial. Each of these motions was overruled, and appellant has assigned all of said adverse rulings as error.

The learned counsel for appellant has spent much time in discussing the sufficiency of each paragraph of complaint, but has failed to cite any authorities in support of his argument. To take up and discuss *seriatim* the many questions argued by appellant would take much time and labor, without corresponding fruitful results. After a careful consideration of the complaint, and an examination of the authorities applicable to cases of this character, we are led to the conclusion that each paragraph of the complaint stated a cause of action. The complaint in general terms proceeds

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upon the theory that appellee was employed by appellant to perform a certain service, which was unattended by danger; that while so employed, he was ordered by appellant to perform another and different service; that he was inexperienced in such latter service; that it was attended with great peril and extra hazard; that he was ignorant thereof, and that appellant carelessly and negligently failed to instruct or warn him of such danger, and that such danger was not apparent to an inexperienced person. We think the facts stated in the complaint bring it within the rule laid down in the case of the *American Strawboard Co. v. Faust*, 12 Ind. App. 421, where it was held, under such facts, that the rule that the servant assumed the risk incident to the employment did not apply. The court did not err in overruling the demurrer to each paragraph of the complaint.

The next question discussed by counsel is the overruling of the motion for judgment on the answers to interrogatories. A correct determination of this question necessitates a statement of the facts specially found. The interrogatories and answers thereto are brief, and we give them in full: "(1) Did plaintiff place his arm beneath the chain to which the drills were then suspended, to wit, his injured arm? Yes. (2) Did plaintiff know that the drills were suspended from the chains when he placed his arm beneath the chain? Yes. (3) Did plaintiff after placing his arm beneath the chain hold it there for the space of about one minute before the drills dropped and pulled down the chain upon his arm? Yes. (4) Could not plaintiff have seen had he looked that the drills were suspended from the chain when he placed his arm beneath the chain? Yes. (5) What was there, had plaintiff looked, to have prevented him seeing that the drills were suspended to the end of the same chain that fell upon his arm? Nothing. (6) Did any one give plaintiff any specific command at the time he went upon the channeler to go upon the channeler? No. (7) Did plaintiff not climb upon the channeler to the point where he was

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injured without any specific order at the time given for him to so climb? Yes. (8) Had plaintiff not had about ten years' experience at the time of the accident in working in quarries? No. (9) Had plaintiff not had about ten years' experience at the time of the accident in working in quarries where the Wardwell Channeler was in use? No. (10) Had plaintiff not frequently before the date of his injury worked as a side man with the Wardwell Channeler, a machine similar to the one on which he was injured? No. (11) Could plaintiff not have attached the hook to the drills by reaching over the wire that connected the drills with the chain that fell upon him? No. (12) Was plaintiff not warned by one Mitchell after he (plaintiff) went above to be careful about the chain and the shive and keep the chain in the groove? No. (14) Do you find that plaintiff was employed to do any particular work in defendant's quarry, or was he employed to do general work? General work. (15) Did plaintiff Redmon when he went on the top of the channeler select his own position and his own mode of work? He did. (16) Did plaintiff Redmon place any thing under the chain to prevent the chain from falling on his hands? No. (17) Did plaintiff perform the act which is alleged to have caused his injury in the manner that was ordinarily safest? No. (18) Did the accident occur in broad daylight? Yes. (19) Did not plaintiff have other and absolutely safe ways of doing the work he was doing at the time of the accident so far as any injury to his right hand or arm was concerned? Yes."

To restate the rule so firmly established and so long adhered to in this jurisdiction of the controlling influence of the special findings, where there is irreconcilable conflict between the general verdict and the special findings, would be a useless task. The complaint as a whole proceeds upon

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the general theory that appellee was employed by appellant in a line of service wholly free from hazard, and while so engaged he was required by appellant to leave his regular work and engage in a service attended by great hazard, concerning which latter service he had had no experience and was unacquainted with its dangers. By its answer to one of the interrogatories, the jury find that he was not employed to perform any particular service, but under the terms of his employment he was to perform "general work". A part of the work to be performed by the employes of appellant was to operate the channeler and when appellee was injured he was assisting in its operation, and thus was performing a part of the "general work" required of him by the terms of his employment. By the general verdict the jury found that appellee was employed to perform the service alleged in each part of the complaint and by their answer to interrogatory numbered fourteen, they found a specific and affirmative fact, which is in open contradiction to the general verdict. Not only this, but the answer to interrogatory fourteen contradicts the very theory of each paragraph of the complaint, wherein it is charged that appellee was employed specially as a "wheeler". It is a familiar rule that a plaintiff is bound by the theory of his complaint, and that he must recover, if at all, upon such theory. In *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, appellee sued to recover damages for injuries received as "superintendent of bridges." Upon the trial, he attempted to recover as a passenger on one of appellant's trains. It was held that he could not recover as a passenger, because he had sued as a superintendent of bridges. See, also, *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394. Again by the general verdict the jury found that appellant was guilty of all the material acts of negligence charged in the complaint, and that appellee was without fault or negligence on his part which contributed to his injury. By the answers to interrogatories, we are unable to discover any act of negligence on the part of appellant. but

on the contrary, the answers taken and considered as a whole, show that it was free from negligence. But if appellant was negligent, appellee can not recover if his own negligence contributed to his injury, or if his injury was incident to the service in which he was engaged. If appellee was employed to do general work (and this fact is affirmatively found), and he entered upon such work without objection, he assumed the hazards and risks incident thereto. See *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Guedelhofer v. Ernsting*, ante, 188, and authorities there cited.

Turning to the interrogatories and answers, a cursory review will readily demonstrate that the facts thereby established preclude appellee's recovery, notwithstanding the general verdict. By these, we find that appellee placed his arm beneath the chain, to which the heavy drills were suspended; that he knew the drills were so suspended; that he held it there for a minute before the drills dropped; that he went upon the channeler without any specific command or direction of any one; that he was employed to do general work; that when he went on the channeler, he selected his own position and his own mode of work; that he did not place anything under the chain to keep it from falling; that he did not perform the work he was doing in the manner that was ordinarily safest; that the accident occurred in daylight, and that he had another and absolutely safe way of doing the work so far as any danger or injury to his hand or arm was concerned. It is plain that the entire machinery with which he was working, and the whole situation, was open and obvious to appellee. He was bound to know that if he placed his hand under the chain to which were attached drills weighing five or six hundred pounds, and the chain with such weights attached should fall upon it, he would be injured. It was an open obvious risk. He took no precautions to keep the chain from falling; he kept his hand under the chain for about one minute; he did not do the work in the ordinarily safest manner, and there was

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an absolutely safe way of doing the work. There is nothing in the record to show that appellant was under any legal obligations to give him special instructions or warnings. A failure to warn or instruct creates no liability unless it is negligence, and also such failure is the proximate cause of the injury. There is no negligence without a violation of some duty, and there can be no violation of duty unless such duty exists. Under the facts specially found, it must be remembered that appellee was not ordered to perform extra hazardous work outside of his employment; that if there was danger in the service in which appellee was engaged, such danger was patent and obvious; that he chose his own manner of performing the service, and performed it without any command or direction of any one. Under such facts, no duty was imposed upon appellant to warn or instruct him as to such danger. It is shown that he was injured while working within the scope of the service which he undertook to perform, and from dangers incident to such service. In support of the proposition that it was not negligence in appellant in failing to give appellee instructions as to the dangers he might encounter in the service in which he was engaged, we cite the following authorities: *Gaertner v. Schmitt*, 47 N. Y. Supp. 521; *Stuart v. Street R. Co.*, 163 Mass. 391, 40 N. E. 180; *Lowcock v. Franklin Paper Co.*, 169 Mass. 313, 47 N. E. 1000, 1001; *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Pratt v. Prouty*, 153 Mass. 333, 26 N. E. 1002; *Ciriack v. Merchants Woolen Co.*, 146 Mass. 182, 15 N. E. 579; *Arizona Lumber Co. v. Mooney* (Ariz.), 42 Pac. 952; *Wilson v. Mass. Cotton Mills*, 169 Mass. 677, 47 N. E. 506, 507; *Hazen v. Lumber Co.*, 91 Wis. 208, 64 N. W. 857; *Iron Ship-Building Works v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Mackin v. Alaska, etc., Co.*, 100 Mich. 276, 58 N. W. 999; *Nugent v. Kauffman, etc., Co.*, 131 Mo. 241, 245, 257, 33 S. W. 428; *O'Hare v. Keeler*, 48 N. Y. Supp. 376, 377; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Atlas Engine Works*

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v. *Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Wabash Paper Co. v. Webb*, 146 Ind. 303; *Guedelhofer v. Ernsting*, ante, 188, and cases there cited.

Concede for the sake of argument that appellee was inexperienced in the work he was doing, yet appellant had a right to presume that he would exercise some degree of care to avoid injury, and that he would not place himself in a dangerous position unless such position was one which he was ordered to occupy. *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293. The law of negligence is so firmly established that there is no longer any speculation or uncertainty about it. An employer is not liable for an injury to his employe that could not reasonably have been anticipated. *Standard Oil Co. v. Helmick*, 148 Ind. 457. Here appellant could not have anticipated the happening of the particular accident that resulted in appellee's injury. We take it to be the law that if there are two ways of performing an act, one of which is attended with peril or danger, and the other is absolutely safe from danger, and the person performing the acts, upon his own volition, chooses the dangerous way, and is injured, he can not call upon his employer to respond in damages. Such conduct would constitute contributory negligence. See *Erskine v. China, etc., Co.*, 71 Fed. 270; *Wabash Paper Co. v. Webb*, 146 Ind. 303. Another well established rule is, that where danger is alike open to the observation of all, both the master and the servant are on an equality, and the master is not liable for any injury to the servant resulting from the dangers of the business in which he is engaged. Beach on Cont. Neg. §140; Bailey's Personal Injuries, §§777, 778; *Rush v. Missouri, etc., Co.*, 36 Kan. 129; *Burlington, etc., R. Co. v. Liehe*, 17 Col. 280, 286, 29 Pac. Rep. 175; *Vincennes, etc., Co. v. White*, 124 Ind. 376; *Griffin v. Ohio, etc., R. Co.*, 124 Ind. 326; *Atlas Engine Co. v. Randall*, 100 Ind. 293.

The facts specially found bring appellee within the rule

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just stated. A further discussion of the question seems useless.

The facts specially found irresistibly lead to three conclusions: (1) That appellee assumed the risks incident to his employment; (2) that he was negligent in the manner of performing the service in which he was engaged, and (3) that appellant was not negligent as charged. These facts being thus established, they can not be reconciled with the general verdict upon any supposable state of the evidence, and they controvert some fact or facts which constitute an essential and indispensable part of appellee's cause of action. In such case, the special facts found are in irreconcilable conflict with the general verdict. The general verdict necessarily affirms that appellant owed to appellee a duty that it did not perform; that it was negligent, as charged, and that appellee was without negligence. These facts are flatly and unequivocally contradicted by the special findings. As was said in *Pennsylvania Co. v. Myers*, 136 Ind. 242: "In case of such conflict, the statute requires us to treat the special findings as true, and the general verdict, to the extent of such conflict, as untrue; and requires us to hold that the former shall control the latter, and to give judgment accordingly." §547 R. S. 1881, §547 Burns 1894. So it appears that the special findings in the case before us so far destroy the force of the general verdict as to show that appellee has wholly failed to establish his cause of action against appellant, as charged in his complaint. This conclusion makes it wholly unnecessary for us to determine other and very interesting questions which counsel have so ably discussed.

The judgment is reversed, and the court below is directed to sustain appellant's motion for judgment on the answers to interrogatories.

Board, etc., v. Board, etc.

THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY
v. THE BOARD OF COMMISSIONERS OF
TIPTON COUNTY.

[No. 2,898. Filed November 22, 1899.]

COUNTIES.—*Change of Venue.*—*Costs.*—*Attorney's Fees for Defending Poor Person.*—The board of county commissioners has exclusive jurisdiction of claims against the county, and an allowance made attorneys for defending a poor person, under §§1847, 1848 Burns 1894, by the court of the county to which a change of venue had been taken is not conclusive against the county from which the cause was removed, but is only *prima facie* evidence of the correctness of the amount allowed.

From the Clinton Circuit Court. *Reversed.*

T. J. Kane, R. K. Kane and T. E. Kane, for appellant.
G. H. Gifford and J. R. Coleman, for appellee.

COMSTOCK, C. J.—At the September term, 1895, of the Hamilton Circuit Court, the grand jury for said county returned an indictment against one Charles Stevenson for murder in the first degree. The venue of the cause was changed to the Tipton Circuit Court, in which court Stevenson, as a poor person, asked to have counsel assigned to make his defense. The court thereupon appointed three practicing attorneys, Messrs. Fertig, Neal and Waugh to appear in his behalf. The attorneys named accepted the employment and conducted the defense. After the trial of the cause, to wit, at the April term of the Tipton Circuit Court, they filed a claim before the judge of said court for their services so rendered, in the sum of \$756.60, which claim was allowed in the sum of \$656.60, and the clerk of the Tipton Circuit Court certified the sum so allowed to the auditor of Tipton county, whereupon he drew his warrant upon the treasurer of his county for said amount in their favor; the same was paid to them by the treasurer of said county. On the 28th of May, 1896, the judge of the Tip-

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ton Circuit Court allowed the claim in favor of appellee against appellant, which claim when so allowed was filed by appellee with the auditor of Hamilton county to be by him presented to the board of county commissioners of his county for allowance and payment. On the 17th of December, 1896, said appellant board allowed said claim for the sum of \$375, and no more. Appellee refused to accept such partial allowance and appealed from the action of appellant to the circuit court of Hamilton county. Upon change of venue to the Clinton Circuit Court, appellant demurred to the complaint, which demurrer was overruled, and appellant answered in two paragraphs, the first a general denial, the second alleging in substance the facts as above set forth, and, in addition, that the judge of the Tipton Circuit Court allowed said claim without the knowledge or consent of appellant; that the clerk of the Tipton Circuit Court certified said claim to the auditor of the county last named; that the auditor drew his warrant for the amount named, and the treasurer of said county paid the same; that the acts of said officers of said Tipton county were done with full knowledge of the foregoing facts and without the knowledge and consent of appellant. A demurrer to the second paragraph of answer was sustained and, appellant refusing to plead further, judgment was rendered in favor of appellee. The errors assigned are the action of the court in overruling the demurrer to the complaint, and in sustaining appellee's demurrer to the second paragraph of answer.

Counsel do not question the authority of the courts to appoint counsel to defend a person charged with crime who is unable on account of poverty to engage such counsel, and that the county in which the cause originated is liable to the attorney for the reasonable value of his services rendered under such appointment. The reversal of the judgment is asked upon the ground that the charge of the attorneys who were appointed in the case at bar was a debt due them from Hamilton county for which the county of Tipton

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was in no sense liable, and that when the treasurer of Tipton county paid the claim without the same being filed with the auditor of Hamilton county, and without its previous presentation to the board of commissioners of Hamilton county for allowance, and without the knowledge or consent of the last named county, Tipton county became a mere volunteer and can not compel Hamilton county to reimburse her.

The sole question involved in this appeal is whether or not the county from which the venue of a criminal cause has been changed is liable to reimburse the county to which the change has been taken for expenses incurred in the trial of the cause. §§1847, 1848 Burns 1894, §§1778, 1779 Horner 1897, provide for costs in criminal cases incident to a change of venue. The first named section reads: "In all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of receiving, delivering, and keeping the prisoner, and the per diem allowances and expenses of the jury trying the cause and of the whole panel of the jury trying the cause, and of the whole panel of jurors in attendance during the trial." The second section reads: "All costs and charges specified in the last preceding section accruing justly and equitably within its provisions shall be awarded and allowed by the court trying such cause; but where specific fees are allowed by law for any duty or service no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken." Under the statute and the decisions of the Supreme Court and this Court, it was proper for the Tipton Circuit Court to determine the value of the services rendered, and make an allowance for the same. *Board, etc., v. Pollard*, 17 Ind. App. 470. But the amount so fixed was not conclusive against Hamilton county; nor was such allowance the basis of the claim of the attorneys against Hamilton county. *Trant v. Board, etc.*, 140 Ind. 414; *State, ex rel., v. Jamison*, 142

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Ind. 679; *Board, etc., v. Pollard, supra.* In *Board, etc., v. Summerfield*, 36 Ind. 543, the court said: "When a person under the law was entitled to some allowance, the sum settled and allowed by the court will be *prima facie* evidence as to the correctness of the amount allowed." The claim for the services in question was due from Hamilton county. It was a claim of which the board of commissioners was given exclusive jurisdiction; it could only be collected by filing the same with the board of commissioners as required by statute unless some other method is provided taking it out of the general statute. There is no statute providing any other method. The claim not being against Tipton county, nor one which it could be compelled to pay in the absence of a statute authorizing its payment, we are unable to see how it can now ask to be reimbursed. That a practice of long standing was followed by the Tipton Circuit Court can not justify an unauthorized act.

The judgment is reversed, with instruction to sustain the demurrer to the complaint.

PAPE ET AL. v. HARTWIG.

[No. 2,888. Filed November 23, 1899.]

BILLS AND NOTES.—Action by Indorsee.—Consideration.—Evidence.—

Where in an action on a promissory note by an indorsee a defense was interposed that the note was given for a patent right, evidence as to plaintiff's custom of loaning money and purchasing notes was properly excluded. pp. 336, 337.

PRACTICE.—Cross-Examination.—Offer to Prove.—Harmless Error.

—A cause will not be reversed on account of the action of the court in permitting counsel to make an offer, in the presence and hearing of the jury, to prove the facts as detailed in a question propounded to a witness on cross-examination, to which an objection had been sustained, where the court informed the jury not to consider any facts stated in the offer to prove, and it appears from the record that a correct conclusion was reached by the jury. pp. 337-339.

EVIDENCE.—Bills and Notes.—Where in an action on a promissory note the question was raised as to plaintiff's knowledge at the time of the

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purchase of the note that it was given for a patent right, no error was committed in permitting plaintiff to relate a conversation had with the payee of the note after he had purchased it, in which he was first informed that it was given for a patent right. p. 339.

MISCONDUCT OF COUNSEL.—*Comment on Interrogatories to Jury.*—A statement made by counsel in his closing argument to the jury that “this interrogatory is a trap, fixed for you, and you should not be caught by it,” was a legitimate argument, since such language could only have been understood by the jury as meaning that the question was misleading, or was subject to two meanings. pp. 339, 340.

APPEAL AND ERROR —*Joint Assignment of Error.*—*Instructions.*—A joint assignment in a motion for a new trial that the court erred in giving a series of instructions is not available on appeal unless all of the instructions in the series are bad. p. 340.

INSTRUCTIONS.—*Bills and Notes.*—Where the words “given for a patent right” were omitted from a promissory note, the action of the court in misquoting the statute as to whose duty it was to insert such words in a note given for a patent right, in an instruction in the trial of an action on the note by a purchaser thereof, was harmless error, since the motives of the seller or maker of commercial paper have no place in determining the rights of the buyer. p. 340.

BILLS AND NOTES.—*Commercial Paper.*—*Note Given for Patent Right.*—*Bona Fide Purchaser.*—*Notice.*—Where a note is offered for sale which is in form commercial paper, and is without any infirmity appearing upon its face, the purchaser is not put upon inquiry as to any equities existing between the original parties to the note. p. 341.

SAME.—*Commercial Paper.*—*Note Given for Patent Right.*—*Failure of Maker to Insert “Given for Patent Right.”*—The maker of a note given for a patent right who fails to place or cause to be placed in the note the words which destroy its negotiability is guilty of negligence, and he cannot defend against it in the hands of a *bona fide* holder for value before maturity and without notice. p. 341.

From the Allen Superior Court. *Affirmed.*

W. Leonard and E. Leonard, for appellants.

W. P. Breen and John Morris, Jr., for appellee.

HENLEY, J.—Appellee, who was the plaintiff below, commenced this action against appellants on two promissory notes which had been purchased by him of one Clayton L. Stoner, the payee named in both of said notes. The notes were in form negotiable by the law merchant. The appel-

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lants Hunter and Becker jointly answered in two paragraphs. The appellant Pape separately answered in two paragraphs. The first paragraph of each answer was a general denial. The second paragraph alleged in substance that these notes were given for a patent right; that the words "given for a patent right" were not written in the body of the notes or either of them; that appellee purchased said notes with full knowledge of all said facts. Appellee replied first the general denial; second, that he purchased the notes in suit in good faith, before their maturity, for a valuable consideration and without knowledge that the notes had been given for a patent right. This reply was addressed to the joint answer of appellants Hunter and Becker. At the same time appellee filed a reply in three paragraphs to appellant Pape's separate answer, the first paragraph of which reply is a general denial, the third being in substance the same as that addressed to the answer of Hunter and Becker, while the second paragraph alleged that there was an agreement between appellant Pape and Stoner, the payee of the notes, that the words "given for a patent right" should not be inserted in the face of the notes, so that the said Stoner might the more easily negotiate them; that appellee had no notice or knowledge of said agreement at the time he purchased said notes, and had no notice or knowledge at the time he purchased said notes that said notes were given for a patent right. There was a trial by jury, and verdict and judgment for appellee for the principal and interest of said notes, costs and attorneys fees.

There is no question raised in this court as to the sufficiency of any of the pleadings. Counsel for appellants say: "The only error relied upon, and to which we desire to call the attention of this court, is the overruling of the motion for a new trial." It is also conceded by appellants' counsel, that, if appellee purchased the notes in suit without notice that they were given for a patent right, he would be entitled to enforce them against appellants. Such is the rule laid

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down in numerous cases by our Supreme Court. *New v. Walker*, 108 Ind. 365; *Sondheim v. Gilbert*, 117 Ind. 71, 5 L. R. A. 432; *Tescher v. Merea*, 118 Ind. 586.

The motion for a new trial embraces twenty-seven reasons which we will dispose of in the order in which they are discussed in appellants' brief. Reasons three, four, five, and six relate to the action of the court in refusing to permit appellee while a witness in his own behalf upon cross-examination to answer the following questions, viz.: (3) "Can you give the jury any idea how much money you have loaned, and how many notes you have purchased during the time you have been in business? (4) Have you purchased any notes and mortgages other than the ones in suit? (5) Was it your custom to buy the notes that you purchased without asking any questions as to what the consideration was, or what they were given for? (6) Is it your custom to purchase notes of strangers without asking why the note was given or making some inquiry as to whether or not the note was all right?"

The facts which impeached the validity of the note were specially pleaded by appellants in their answers, and upon the issue thus raised the appellants had the burden of proof. The burden of proving the averments of the reply was upon appellee. *Cronkheit v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127. In the case at bar the only facts averred in appellants' answers, the proof of all of which would have removed appellee from the position of a *bona fide* holder, were: (1) That the notes were given for a patent right; (2) that the words "given for a patent right" were not written in the body of the notes; (3) that appellee knew at the time he purchased the notes that they had been given for a patent right. We are unable to see how the legitimate answers to either of these questions would have tended to prove any of the material allegations of appellants' answers, nor could they have tended to disprove the averments of appellee's reply. It would hardly be contended that the answers to these

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questions would show that the notes were given for a patent right, or that the answers would show that the words "given for a patent right" were not in the notes. Then if competent for any purpose it must have been to show notice upon the part of appellee of some infirmity existing in the notes, and the only infirmity alleged is the failure to insert the words, "given for a patent right."

The answers may have tended to prove a general negligence or lack of diligence upon the part of appellee in the transaction of his business, but notice or knowledge of facts which might affect the validity of commercial paper as between the original parties to it does not, and cannot, depend upon the negligence or diligence of the purchaser. *Collins v. Gilbert*, 94 U. S. 753; *Tescher v. Merea*, 118 Ind. 586.

What was done by appellee in certain other particular cases, or what he generally did as to using diligence in investigating the integrity of the paper he purchased, or the number of notes and accounts he had purchased prior to the purchase of the notes in suit, would certainly not be proper evidence to show notice of some infirmity in this particular instance. If such evidence is permitted to go to the jury with the sanction of the trial court, with the understanding that it may or can be used by them to affect or determine the validity of commercial paper, then the use of such form of promissory note or bill of exchange had as well be abandoned, as its value to the merchant and banker and the commercial world would end.

Reasons fifteen, sixteen, seventeen, twenty, and twenty-one of the motion for a new trial present the question as to whether the trial court erred in permitting counsel for appellee while cross-examining one of appellants, after an objection to a question addressed to the witness had been sustained, to make an offer in the presence and hearing of the jury, over appellants' objection, to prove the facts as detailed in the question. Appellants' counsel objected to any offer to prove

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being made, on cross-examination, in the presence of the jury, as tending to bias and prejudice the jury. The court overruled the objection. Counsel for appellee made the offer to prove, and counsel for appellant moved the court to instruct the jury not to consider any facts mentioned by counsel in the offer. This motion was overruled, the court saying in the presence and hearing of the jury: "Motion overruled. The jury are supposed to be honest men and do their duty as citizens and as jurors, and I think understand without instruction that offers are not evidence, and should not be considered as such; they are supposed to be doing impartial justice under the law, without being instructed specially at every offer that is made."

The offers to prove should not have been permitted. The only question is whether such action in this case amounts to reversible error. It is well settled in this State, that in order to save the exception and present any question upon cross-examination to which an objection has been sustained, an offer to prove is not necessary. The question is properly saved when at the proper time an exception to the ruling of the court is reserved. *Hyland v. Milner*, 99 Ind. 308; *Wood v. State*, 92 Ind. 269; *Harness v. State, ex rel.*, 57 Ind. 1.

In the case of *Randall v. State*, 132 Ind. 539, the Supreme Court passed upon this question, and in speaking of the offer to prove made by the prosecuting attorney said: "The action of the prosecutor was improper and should have met with a prompt rebuke from the court. While the course pursued by him is not uncommon, it should never be tolerated. It is an indirect method of reaching and influencing improperly the minds of jurors by a suggestion of the existence of facts prejudicial to the defendant, which the court has by its ruling already adjudged to be incompetent and improper." We cannot say, in view of the fact that the court informed the jury not to consider any facts stated in the offers to prove, and for the further reason that it appears

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from the record that the jury arrived at a correct conclusion and that substantial justice had been done the parties, that the error in this case was sufficient to justify a reversal of the judgment.

The next question argued by appellants' counsel arises under reasons eighteen and nineteen of the motion for a new trial. Appellee while testifying in his own behalf was asked the question, as to when it was that he was first informed that the notes in suit were given for a patent right and how it happened that he received such information. Appellee answered that he was first informed by Mr. Pape that the notes were given for a patent right and that the information was acquired about one week after the notes were purchased. Appellee was then asked to relate the conversation had at that time with appellant Pape. An objection was interposed by appellants to this question. The court sustained the objection as to appellants Hunter and Becker, and overruled it as to Pape. We think the ruling of the court was right. The answer to the question objected to was simply the repetition of the conversation with Pape by which appellee acquired the information mentioned in the preceding question and answer. The proper way to convey to the court or jury trying a cause facts acquired in conversation, if such facts are competent to be proved, is to detail the conversation itself.

Reasons twenty-two and twenty-three of the motion for a new trial relate to the alleged misconduct of appellee's counsel during the closing argument to the jury. Mr. Breen one of the attorneys for appellee in his closing argument to the jury in referring to one of the interrogatories submitted to the jury by appellants said: "Gentlemen of the jury, this interrogatory is a trap fixed for you, and you should not be caught by it." It seems to us that this was legitimate argument. It was manifestly the intent of the speaker to tell the jury by the use of the above words, that a certain question was misleading, or was subject to two meanings, or might

be construed with reference to more than one fact or circumstance. The speaker may not have selected the best words to convey his meaning to the jury, but the words used when applied to an interrogatory could have been understood by the jury only in the way here indicated.

The last question discussed by counsel arises under reasons twenty-four, twenty-five, twenty-six, and twenty-seven of the motion for a new trial, and relates to the giving and refusal to give certain instructions to the jury. The error, if any, attempted to be presented by the twenty-seventh reason for a new trial is not available, because the assignment is joint. It reads as follows: "The court erred in giving to the jury trying said cause instructions numbered one, two, three, four, five, and six on its own motion." Counsel for appellants do not contend that all of said instructions are bad. It is contended by counsel that the court in instructing the jury misquoted the statute as to whose duty it was to insert the words "given for a patent right" in a note given for such purpose. It may be conceded that the lower court did misquote the statute in this regard, but this was a harmless error. It was immaterial in this case whose duty it was to write these words in the notes. The whole question presented by the pleadings was, did the purchaser have notice of the defenses existing between the original parties to the note at the time he purchased them. The good faith of the buyer is determined by the evidence introduced upon the question of notice. If he had no notice of the infirmities of the paper then he is necessarily a *bona fide* purchaser. The notice is either actual notice, or such a combination of circumstances as will create a distinct legal presumption that the purchaser must have known of the defenses to the paper. The motives of the seller or of the makers of commercial paper have no place in determining the rights of the buyer. The question is as to the good faith of the buyer. *Helmer v. Krolick*, 36 Mich. 371; *Church v. Clapp*, 47 Mich. 257, 10 N. W. 362.

In the case of *Tescher v. Merea*, 118 Ind. 586, it is said:

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"It is undoubtedly true that the conclusion may be deduced that a purchaser had notice when there is such a combination of circumstances shown as to create a distinct legal presumption that he was acting collusively, and in bad faith, and that he must have known the facts without inquiring. * * * The ultimate fact to be found is not whether the indorsee might have ascertained or could have known that the note was fraudulently obtained, but whether he in fact knew it, or acted in bad faith in abstaining from inquiry. As has been said, it is a question, not of negligence or diligence, but one of honesty and good faith. *Carroll v. Hayward*, 124 Mass. 120; *Kellogg v. Curtis*, 69 Me. 212." See, also, *Hankey v. Downey*, 3 Ind. App. 325.

Where a note which is by its form commercial paper, and is, without any infirmity appearing upon its face, offered for sale, the purchaser is not put upon inquiry as to any equities existing between the original parties to the note. It is also the law in this State that where a person negligently signs a note negotiable by the law merchant, fair upon its face, and complete in all its parts, he puts in circulation an instrument which he must know is a subject of barter and sale in the commercial world, and to which certain rights and liabilities are guaranteed by law to the parties thereto, and he cannot defend against it in the hands of a *bona fide* purchaser. *Baldwin v. Barrows*, 86 Ind. 351; *Fisher v. Von Behren*, 70 Ind. 19; *Woollen v. Ulrich*, 64 Ind. 120.

The maker of a note given for a patent right who fails to place or cause to be placed in the note the words which destroy its negotiability and warn prospective purchasers of the equities existing between the original parties to the instrument is guilty of negligence, and he cannot defend against it in the hands of a *bona fide* holder for value, before maturity and without notice. *Tescher v. Merea*, *supra*.

The statement by the lower court of the law applicable to the issues and evidence in this cause in the instructions to the

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jury was in all respects in accord with the rules of law herein laid down. We find no available error. Judgment affirmed.

MARION CITY RAILWAY COMPANY v. DUBOIS.

[No. 2,918. Filed November 28, 1899.]

VERDICT.—Special Findings.—Overthrow of General Verdict.—It is not sufficient for the overthrow of the general verdict for the plaintiff that the facts specially found do not establish the plaintiff's alleged cause of action, but it must appear that such facts are irreconcilably inconsistent with the general verdict. *p. 343.*

STREET RAILROADS.—Horse Frightened at Approach of Car.—Personal Injuries.—A street railway company is not liable for an injury caused by the mere fright of a horse at an approaching car, where there is no reckless or wanton conduct indicating disregard of the safety of those using the street for passage, or malicious purpose to injure them. *pp. 346, 347.*

SAME.—Horse Frightened at Approach of Car.—Special Finding.—Overthrow of General Verdict.—In an action against a street railway company for damages for personal injuries to plaintiff's wife, the special findings showed that while plaintiff and his wife were driving across a covered bridge their horse took fright at a car coming around a curve from the opposite direction, and the action of the horse in its attempt to run away caused plaintiff's wife to fall from the buggy, injuring her; the jury found that it was not in evidence that the car was being run without due regard for the safety of persons traveling in private conveyances; that the motorman who had charge of the car applied the brake for stopping the car as soon as he could do so after he saw that the horse was showing signs of fright; that the car at the time of the accident was on an ascending grade and could have been easily stopped before it was stopped, and if it had been stopped at the foot of the grade, the accident would probably have been avoided. *Held*, that the facts found were irreconcilably inconsistent with a general verdict for plaintiff. *pp. 343-347.*

From the Grant Circuit Court. *Reversed.*

W. H. Carroll and *G. D. Dean*, for appellant.

W. J. Houck, for appellee.

BLACK, J.—The appellee in his complaint against the appellant alleged the personal injury of his wife by her

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being thrown from a buggy in which she was riding with the appellee, her fall being caused by the running away of the horse drawing the vehicle, through fright produced by the negligence of the appellant in causing the approach toward the animal of an electric car at a high rate of speed; and damages were sought for the appellee's loss of his wife's services and for expenses incurred by him because of her injury.

A jury returned a general verdict, awarding the appellee \$250, and also returned answers to interrogatories submitted upon the request of the parties.

The motion of the appellant for judgment in its favor upon the answers to interrogatories, notwithstanding the general verdict, was overruled, and this ruling alone is presented for our consideration.

It is claimed on behalf of the appellant that many of the findings in answer to interrogatories relating to the question of negligence on the part of the appellant and that of contributory negligence on the part of the appellee and his wife were not findings of facts, but were conclusions of law, and therefore are not entitled to any consideration. If, however, such conclusions be eliminated, it remains true that the jury by the general verdict determined that the appellant was negligent, and that the appellee's wife was injured thereby, as alleged in the complaint, without contributory negligence on the part of the appellee or his wife. To decide that the court erred in overruling the appellants' motion for judgment, the special findings of the jury must show facts irreconcilably in conflict with the general verdict. It is claimed for the appellant that the special findings show that there was no negligence on the part of the appellant, and also, though less clearly, that there was contributory negligence.

The special findings show that the appellee with his wife and daughter, riding in a buggy drawn by one horse, passed eastward over a covered and enclosed bridge 232 feet long, used by the public generally as a public highway, across the

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Mississinewa river. From the east end of the bridge, in which the passageway was sixteen feet wide, a road extended into Gas City. The appellant's railway, on which cars were run by electricity with overhead trolley, ran along the north side of the highway and through the bridge. While the buggy was in the bridge, a car came around a curve in the electric road about 800 feet east of the bridge and was proceeding thence in a practically straight line westward toward the bridge. The horse became frightened at the approach of this car, and the action of the horse through its fright and attempt to run away caused the fall of the appellee's wife to the ground at a point on the road about sixteen feet east of the bridge. The jury found that the point at which the injury occurred was more than ordinarily dangerous for the passing of a conveyance by a car; that the car at the time of the accident was on an ascending grade, the ascent commencing at a point from 100 to 125 feet east of the bridge, which would have rendered it easy for those in charge of the car to have stopped it before it did stop; that if it had been stopped at or near the foot of the grade, it was more than likely the accident would have been avoided. The jury found that it was not in evidence that the car was being run at the time of the accident without due regard for the safety of persons traveling in private conveyances; that vehicles were passing over the bridge in plain view of those operating the car approaching the bridge, through almost all the distance of 800 feet from the turn in the road to the bridge; that the roadway through the bridge and south of the railway tracks was eight and one-fourth feet wide; that the driveway in the eastern approach to the bridge was at the east end of the bridge eight and one-half feet wide and gradually widened toward the east.

The appellee first saw the car when he was in the west end of the bridge and the car was at or near the curve 800 feet east of the east end of the bridge. It was not possible for the appellee to turn within the bridge and retrace. The

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jury found that, under all the circumstances at the time and place of the accident, there was nothing that the appellee could or should have done, other than what he did, to avoid the accident and prevent injury to himself, his property, and the persons under his charge. The appellee was acquainted with the bridge and the east approach thereto, as to their width, and knew that the railway track was laid over the bridge and approach, and that cars were and had been operated thereon. The appellee had never driven the horse over the bridge, and had not known it to have been driven over it when a car was approaching, and the horse had never met a car in the bridge. The three persons were riding in a buggy intended to carry two adult persons only, the buggy having a very low back projecting but one inch or one inch and a half above the cushion, it being difficult for a person on the outside to retain a place thereon while three adult persons were riding in the buggy. The horse was a quiet, gentle, and tractable horse, accustomed to seeing and passing moving street-cars propelled by electricity without becoming frightened thereat. The car was stopped about eighty-four feet east of the place where the appellee's wife was first on the ground, which was about sixteen feet east of the bridge. The electric power which propelled the car was shut off, so as not to propel it, 570 feet east of the bridge. The motorman who had charge of the car applied the brake for stopping the car as soon as he could do so after he saw that the horse was showing signs of fright. The car was running at the speed of about twelve miles per hour, from the time it left the curve till it stopped at a point about 100 or ninety feet east of the bridge. The horse was frightened because of the close proximity to which it was brought to the car by reason of the narrowness of the eastern approach and the roadway thereon. When the horse manifested the first signs of fright, the appellee struck it with a whip, thereby increasing its speed.

We are of the opinion that the facts specially found did

not constitute contributory negligence, as a matter of law, but the jury, notwithstanding such facts specially found, might consistently find, as was found by the general verdict, that there was no negligence of the occupants of the buggy proximately contributing to the injury.

But it is more difficult to find the necessary consistency between the special findings in answers to interrogatories and the conclusion involved in the general verdict that the appellant was chargeable with negligence which was the cause of the injury.

It is not sufficient for the overthrow of the general verdict to decide that the facts specially found did not establish negligence, but for such result it must be decided that the special facts establish the conclusion, as a matter of law, that the appellant did not by the negligence of its servants cause the injury; that is, that the facts specially found are irreconcilably inconsistent with the general verdict.

The electric railway company had a right to run its cars upon its railway track without unnecessary interruption or such delays as would be incompatible with the carrying on of its legitimate business of transporting passengers. The appellee had a like right to the use of the public highway by traveling thereon in his vehicle drawn by a horse. A rule prescribing the care which the street railway company should exercise for the safety of travelers in vehicles must be reasonable and practicable, having in view the purpose to be subserved and the means of accomplishing it. The company can not be held responsible for injury caused by the mere taking fright of horses at the appearance of the car approaching on the same street and being operated in the ordinary manner, though it be approaching rapidly, where there is no reckless or wanton conduct indicating disregard of the safety of those so using the street for passage or malicious purpose to injure them. No rights should be held to belong to such a company in this respect except such as legitimately belong to the full enjoyment of the franchise; but the rights of

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others in the use of the highway must be enjoyed with such regard for the right to the concurrent use by the railway company as will not practically and unreasonably interfere with the rapid transit for which electric railways are intended and adapted. *Terre Haute, etc., R. Co. v. Yant*, 21 Ind. App. 486.

In the case at bar, it appears by the special findings that the electric motive power had been turned off at a considerable distance from the bridge and the appellee, whether because of a descent in the railway or because of the fright of the horse does not appear. But it does appear that as soon as those operating the car saw the horse's fright an effort was made to stop the car; that the brake was applied, and the car was stopped eighty-four feet from the place where the appellee's wife fell from the buggy, and about ninety or 100 feet from the bridge, where the car was upon an ascending grade.

It affirmatively appears that there was no wanton or reckless conduct on the part of the appellant's servants, but, on the contrary, there was an effort to prevent the injury. There was no contact of the car with the horse or buggy or those riding in the buggy. The horse did not run down the embankment and thereby injure the appellee's wife, but she fell out upon the road, at a considerable distance from the car.

It would seem almost a declaration against the right of the public to be transported by means of electric railways to hold the appellant responsible for the unfortunate accident which befell the appellee's wife.

The judgment is reversed, with instruction to sustain the appellant's motion for judgment in its favor.

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HIGGINS ET AL. v. QUIGLEY ET AL.

[No. 2,688. Filed June 15, 1899. Rehearing denied Nov. 28, 1899.]

CONTRACTS.—Alteration.—Release of Surety.—A change in a contract to remodel a house by substituting frame for brick in the construction of the second story, and shingling instead of weather-boarding on the frame portion, made without the knowledge or consent of the sureties on a bond executed to secure the performance of the contract, is not such a material alteration as will release the sureties, where the contract provided "that any necessary or desired changes may be made in the plans and specifications for said building during the progress of the work thereon without in any manner affecting the validity of the contract." pp. 348-354.

SAME.—Alteration.—Parties.—An answer to an action on a bond given to secure the performance of a building contract that a new and different contract was entered into without the knowledge or consent of the sureties, signed by but one of the plaintiffs, and thereby substituted different contracting parties, is insufficient, where the complaint averred that the contract was signed on behalf of both plaintiffs, since the capacity in which plaintiff signed the contract may be proved by parol. p. 355.

SAME.—In Conflict with City Ordinance.—Alteration of Contract.—Validity.—Where the manner of constructing a building as provided by the plans and specifications was prohibited by a city ordinance, such contract was not thereby rendered invalid, where the contract provided that any necessary or desired changes might be made in the plans and specifications during the progress of the work without affecting the validity of the contract, and the plans were changed so as not to conflict with the provisions of the ordinance. pp. 358-362.

From the Marion Superior Court. *Affirmed.*

W. A. Pickens, L. A. Cox and S. W. Kahn, for appellants.

Ferdinand Winter, for appellees.

COMSTOCK, C. J.—On the 1st day of August, 1893, appellants Olive and Long entered into a building contract with appellee, giving a bond in the penal sum of \$2,000, with appellants Higgins and McDaniel as sureties thereon.

The complaint charges that on the 14th day of September,

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after the execution of the original contract and bond, a second agreement modifying the original contract was entered into between the principal contractors. It is alleged that this second agreement was signed on behalf of both appellees by appellee Mary Quigley.

The exhibit filed with the complaint shows the new contract signed by Mary Quigley alone, without any modifying description as to the capacity in which she affixed her name.

The separate demurrer of Higgins and McDaniel to the complaint was overruled, and a separate answer filed by them in three paragraphs, a general denial, and two paragraphs setting up affirmative defense. The second paragraph charges that the contract was void because it required the construction of a building in violation of an ordinance of the city of Indianapolis, which prescribed that a two-story brick building such as that contracted for should have walls twelve inches thick, whereas the contract provided for the erection, change, and repair of a building within the said city with brick walls only nine inches in thickness, and that the building was erected in violation of said ordinance. The third paragraph admitted the execution of the contract in its original form, and the execution of the bond in suit by Higgins and McDaniel as sureties only for Olive and Long for the performance of the contract as originally executed, and before it was changed by the second agreement, but alleged that the first contract and bond securing it were void because it provided for the violation of the ordinance mentioned, and in the manner specified in the second paragraph. This paragraph further alleges that after the original contract was executed, and the bond in suit signed, without the knowledge or consent of either Higgins or McDaniel, the contract was materially altered so as to provide for a wooden structure, and the original contract thereby abandoned, and that all the work performed and materials furnished by Olive and Long were performed and furnished under the new contract alone. A reply was filed to these two paragraphs, the first a general

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denial; the second, that the changes made were necessary in the construction of the building, and were contemplated in the original agreement; that no work was done or agreed to be done in violation of an ordinance, and that the changes reduced the cost of the work \$200.

The cause was tried by the court and a finding made and judgment rendered against all the appellants for \$599.60, showing the suretyship of Higgins and McDaniel. A separate motion for a new trial was made by Higgins and McDaniel, and overruled. Upon this appeal the following errors are assigned. (1) That the complaint does not state facts sufficient; (2) that the court erred in overruling the demurrer of appellants; (3) that the court erred in overruling appellants' motion for a new trial.

The first objection urged to the complaint is that it shows, as appellants claim, that after the execution of the bond a different contract was entered into between Olive and Long and the appellee Mary Quigley, and that the original contract was abandoned. It is claimed that this transaction releases the sureties in two ways: (1) It is a material alteration, and the abandonment of the contract secured by the bond, and the substitution of a different contract in its stead, the change being from a brick structure to a frame structure; that the clause of the first contract which says "that any necessary or desired changes may be made in the plans and specifications for said building during the progress of the work thereon without in any manner affecting the validity of the contract," only contemplating such changes as may be within the general scope of the original plans and specifications and not any change that would amount to a departure from such plans. It must be admitted that a provision for making a desired or necessary change could not be construed to contemplate an entire departure from the original plans.

The parts of the complaint to which this objection applies aver that on the 14th day of September, 1893, it was further agreed in writing between said defendants Olive and Long

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and the plaintiffs, such writing being signed on behalf of both plaintiffs by the plaintiff Mary Quigley alone, that the frame part should be shingled instead of weather-boarded and that on account thereof \$20 extra should be added to the contract price, and that two windows should be placed in the rear closets, for which said contractors were to receive \$9 extra. The averments preceding the reference to the agreement of September 14, 1893, show that the building inspector of the city of Indianapolis disapproved the plans and specifications for the improvement to which the first agreement referred, and required a frame structure to be substituted for brick in a portion of the work contracted to be done, and the shingling instead of weather-boarding provided for in the agreement of September 14th had reference to the change required to be made by the building inspector. The specifications, which are referred to, and made a part of the contract, and were upon motion of appellants made a part of the complaint, provide, under the head of "Brick Wall" that "the contractor should build the one-story brick part to the height of the other walls, * * * remove the front and rear brick gables to the plate line, and point up the old wall as directed."

The original contract shows that it was to remodel an old brick house, and the brick work referred to was only such as was required to build up the one-story brick part of an old house to the height of the other walls. We have referred to the fact that the change in question contemplated the substitution of shingling for weather-boarding upon a frame second story of a part only of the building, a part which was one story, and this change involved an addition to the contract price of \$20, the original contract being for \$2,000.

The plans and specifications show that the rear part of the old building was frame, and the contract required that this be removed and replaced by a new frame addition. The building remodeled according to the original plans and specifications was to have been partly of brick and partly

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frame. As constructed in accordance with the change, it was partly brick and partly frame, the difference being that the second story of a part of the building was changed from brick to frame, shingled instead of weather-boarded. The style, shape, proportions, and general arrangement do not appear from the complaint to have been changed. Appellant insists that these changes substituted a frame for a brick structure and "subverted the whole general plan of the structure and introduced a new style of building which was never contemplated by the parties at the beginning." We cannot agree with this claim. The more reasonable proposition is that such changes were provided for in the provision heretofore set out. They were necessary and desired changes stipulated for in the contract. In support of this claim that the clause referred to applies to such changes as may be within the general scope of the original plans, and not any change which would amount to a departure from such plans, changes, such as might be for the greater comfort of the owner or greater beauty of the structure, and "in keeping with general style, extent, and purpose of the original undertaking," appellant cites: *Western Building Assn. v. Fitzmaurice*, 9 Cent. L. J. 169-173; *Grant v. Smith*, 46 N. Y. 93. In the case first cited, the contract provided only for the making of such changes as might be found *necessary*. The changes made were tearing down door frames after they had been placed according to the plans and specifications and substituting others of different form and greater cost, and by changing the finishing windows, which changes were not necessary to complete the house, but solely to gratify the taste of the owner. The court said: "The only other ground upon which it is assumed that the sureties were discharged is that relating to the changes in the work as it progressed. The mere fact that there were departures from the original plans and specifications could not operate such a discharge; because changes, under the direction of the architect, were

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expressly provided for in the contract. * * * The more rational construction is, that such alterations might be made as should be found 'necessary' by the architect; but whether necessary for the completion of the work, for the greater comfort of the future occupants, or for the gratifying of the personal tastes of the owner, was a matter of no concern to any one but the architect himself. The spirit of the contract throughout indicates a purpose to leave all such questions to the architect's discretion. Of course, it is not to be supposed that the architect would be permitted to abuse that discretion by subverting the whole general plan of the structures, and introducing a new style of building which was never contemplated by the contractors. His change, if any, should still be in keeping with the general style, extent, and purposes of the original undertaking." In the present case there was no change in the style, extent, or purpose of the original undertaking. In *Grant v. Smith, supra*, the contract did not provide for changes, and it was held that the change made released the surety. The contract provided for furnishing "a steam engine of twelve inch bore and twenty inch stroke; two cylinder boilers, each thirty feet long and twenty-five inches in diameter, and all the shafts, pulleys, and iron necessary," etc. An engine with three boilers, and of a greater capacity and bore, and for an additional price, was substituted.

In *Howard County v. Baker*, 119 Mo. 397, 24 S. W. 200, the question arose on a claim that there was a variance between the contract pleaded and the proof, and the court expressed the opinion that a change from stone lintels to lintels of railroad iron was not a material change. In *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183, the contract provided for changes and alterations in the following language: "Should the proprietors, at any time during the progress of said work, require any alterations, or deviations from, or additions to, or omissions in, the said contract, specifications, or plans, they shall have the right and power

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to make such change, or changes, and the same shall in no way injuriously affect or make void this contract, but the difference for work omitted shall be deducted from the amount of the contract by a fair and reasonable valuation; and for additional work required in alterations the amount shall be agreed upon before commencing additions." Changes were made and the sureties were held liable on their undertaking. In passing upon the question, the court said: "We also learn from the additional findings of the referee that the changes made were no more than are liable to occur in the construction of a building of the size and dimensions described in the plans. * * * Now, we think just such changes as were made were provided for in the contract." The provision for change in this contract is broader than the one under consideration.

In *Hayden v. Cook* (Neb.), 52 N. W. 165, the court held that the alterations made were within the terms of the contract without stating what the alterations were, and that the sureties were not released.

The same may be said of *Consul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104, the court holding that the alterations were provided for in the contract. In the course of the opinion the court said: "We must not be understood as claiming that the owner has the right to make such changes as he saw proper, regardless of cost and the character and extent of such alterations. The changes and additions must be reasonable and not materially increase the cost of the buildings beyond the contract price. The evidence shows that the alterations were not unreasonable, and that the additional labor and materials did not greatly exceed the value of the work called for by the original contract, which was omitted."

In *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256, the sureties were held to be bound because changes in the contract were such as were provided for, the changes consisting in sinking the foundation wall two or three feet deeper than shown in the original plans, owing to the insecure character of the ground encountered.

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Appellants contend, secondly, that the execution of the second contract released the sureties because it not only substituted a different contract for the original, but substituted different contracting parties, viz., Mary Quigley, instead of Mary and William F. Quigley. Appellants insist that if Mary Quigley signed for any one but herself, she should have so designated; not having done so, it is her individual contract; that if she signed for herself and William F. Quigley, she was acting as his agent, and, under such circumstances, if the contract binds the agent alone, it is her contract only, although it may appear that she was acting as agent for some one else, citing, *Board, etc., v. Butterworth*, 17 Ind. 129, 131.

We think this position of appellants' counsel is not well taken. The complaint avers that the agreement in question "was signed on behalf of both plaintiffs by the plaintiff Mary Quigley alone. It will not be questioned that the capacity in which one signs a contract may be proved by parol; this is not permitted for the purpose of discharging the personal obligation that the signature itself imports, but for the purpose of charging some other person with personal obligation by reason of the fact that the person signing acted as agent or in some other representative capacity, and not solely in his right. The fact, however, that one so signing acted in a representative capacity would not relieve him from personal liability if his agency was unknown to the parties with whom he contracted.

In *Board v. Butterworth, supra*, which was a suit brought against the board of commissioners of Warrick county on a contract signed by Nathan Pryeatt, the court held that it was competent to give evidence of facts tending to show that the contract was in fact the contract of the county.

What we have said applies to the second assignment of error, viz., the overruling of the separate demurrers of Higgins and McDaniel.

Under the third specification of the assignment of errors,

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the overruling of the motion for a new trial, the second reason is the first discussed. It is that the assessment of the amount of the recovery is too high. Appellants set out in their brief a tabulated statement of the items proved, with dates, showing a total of \$2,476.65. Deducting the contract price, plus extras,—\$2,000 plus \$29 equals \$2,029,—shows an overpayment of \$447.65. At the time the building was completed appellees had paid \$1,657.12. Until the contract price, \$2,000, and the charge for extras, \$29, were paid, appellees were not entitled to claim interest; or, in other words, said \$447.65 overpayment could draw interest only from the time of payment. The statement justifies the claim of appellants' counsel that the assessment is too high by \$63.41. From this statement, however, there is omitted an item of \$58, allowed by the court to appellees as rent, at the rate of \$2 a day, from November 1, 1893, when the work was to have been completed, to the 29th day of November, 1893, when it was completed. Adding this amount to the overpayment, \$447.65 plus \$58, we have \$505.65, on which interest should be computed from January 1, 1894, prior to which time the last payment had been made, to the date of judgment, April 30, 1897, three years and four months, amounting to \$100.90, which would make the entire amount appellees were entitled to recover \$606.55, while the judgment was for \$599.55. It is claimed by appellees that there is an error in appellants' brief in this: that item numbered two, "paid painters \$6," and item number forty-one, "paid Olive and Long \$6;" that this amount was paid to Olive and Long, and by them paid to the painter Nealy. It was paid but once. A reference to the evidence sustains appellees' claim, and the discrepancy in the amount of the judgment and the amount it should have been, including the \$58 allowed for rent, on the basis of payments stated in appellants' brief.

The third and fourth reasons for a new trial, that is, that the decision of the lower court was not sustained by the evidence and was contrary to law, are discussed by appellants

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together, and will be so considered here. It is claimed that there is no evidence to support the decision of the court because the contract was illegal by reason of its providing for the erection of a building in violation of an ordinance of the city of Indianapolis. This objection does not arise upon the pleadings. It was presented by the second paragraph of the separate answer of the defendants Higgins and McDaniel, in which they averred that the contract, as originally entered into, provided for the construction of a building with a nine inch brick wall, and that the building was in fact so constructed, and that at the time the contract was entered into and the work done there was in force an ordinance of the city of Indianapolis which prohibited the erection of brick buildings with walls less than twelve inches thick. This answer was not demurred to. A reply was filed to the second paragraph of the answer, in which it was averred that the change in the plans and specifications, set out in the complaint, which was made in obedience to the requirements of the building inspector of the city of Indianapolis, was made necessary by the ordinance referred to in the second paragraph of the answer. Said change consisted in substituting frame construction for brick construction, where by the original plans and specifications it was provided that a nine-inch brick wall should be constructed; and it was denied in such paragraph of reply that the building had been constructed in any respect in violation of the city ordinance, but on the contrary the change averred in the complaint to have been made was made for the purpose of avoiding any such violation, and with that effect. Upon the trial, the undisputed evidence showed that the building which the contract required to be remodeled and improved was, as to its front part, thirty-three by thirty-two feet in size, a two-story brick, and, as to its middle part, immediately in rear of the front, thirty-two by sixteen feet in size, a one-story brick, and in rear of all of this, all frame. The original plans and specifications, as we have already shown, provided that the one-story brick

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middle part was to be made two stories in height, the same as the front part, and all brick. The city ordinance prohibited the construction of brick walls less than twelve inches thick. The walls of the old building were only nine inches thick. The building inspector prohibited the raising of the one-story brick to two stories by building thereon a nine-inch wall, and thereupon the architect gave the contractors, under date of August 12, 1893, notice, in writing, set out in the complaint, to "build that part of the house shown as brick work on the plans, and condemned by the inspector, frame, and finish in every respect as specified on frame addition, with the addition of a molded belt at the second story line." This was the only change made. It changed the material that was originally intended to be used in doing a small part of the work from brick to frame. It did not change the style, dimensions, plan, or arrangement of the building at all. The sole question then is whether providing in the original plans and specifications for construction which was prohibited by a city ordinance invalidates the contract, although it is provided in the same contract that "it is further understood and agreed that any necessary or desired changes may be made in the plans and specifications for said building during the progress of the work thereon, without in any manner affecting the validity of this contract", and although it appears that when it was discovered that the construction as originally provided for was illegal, the plans and specifications were changed, under the authority thus given, so as entirely to remove such illegality, and that the building as in fact constructed did not in any way involve the doing of an illegal act.

There is no controversy between counsel upon the proposition that an agreement to do an illegal act is void, and that the illegality created by a city ordinance has the same force as if it were created by a statute of the State. Counsel for appellees contend that before a contract will be held invalid because of its illegality, it must *require* the doing of an

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illegal act, and that if a contract is subject to two constructions, it will be given that construction which makes it conform to the law. Appellants, conceding the foregoing proposition, insist that the contract in suit in this case required the doing of an illegal act as written when the sureties signed the bond.

The contract in question, by reference to the plans and specifications, provides for the construction of a nine-inch brick wall, which was forbidden by a city ordinance, but its concluding paragraph is as follows: "And it is further understood and agreed that any necessary or desired changes may be made in the plans and specifications for said building during the progress of the work thereon without in any manner affecting the validity of this contract: Provided always that the difference as to cost occasioned by said changes shall be first agreed to in writing by both parties hereto." This language is very broad; it stipulates not only for desired changes, but for necessary changes. The right to alter the plans and specifications was not limited to modifications suggested by the taste and convenience of the parties, but included those that various conditions might render necessary. We cannot know what changes the parties had in mind which might become necessary, but the presumption is not a violent one that they might have had in contemplation variations on account of physical hindrances in obedience to the dominating police power which in all cities of considerable size regulates the material used in, the manner of construction, the lighting, plumbing, hanging of doors, etc. of a house. The parties to the contract are presumed to have had knowledge of the ordinance; they are presumed not to have entered into the contract as an idle thing, but with a view of carrying out its terms. No changes could be more necessary than such a one as would permit the performance of the contract. It is argued by appellants that if the first contract was illegal that everything that was done afterwards to make it legal was the mak-

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ing of a new contract, and that for that reason also the sureties could not be held upon the bond. This would be true if the original contract did not itself provide for necessary changes. In this connection appellants cite and quote from the opinion in *Burger v. Roelsch*, 28 N. Y. Supp. 460. It was a case where the contract had been made to erect a building with walls of less thickness than was required by the building ordinance, and the permit was refused. The contractor then proposed to change to thicker walls. This was declined. He then proposed to change the structure to wood, and this proposal was adopted by the owner, but when the bids were taken upon the wood structure, the contract was let to another than the original contractor. Suit was brought for damages on the original contract, and a motion for nonsuit at the close of the evidence was denied. The supreme court held that as the contract was in violation of an ordinance, it was void, quoting from *Wharton on Contracts* to the effect that "a contract void for illegality is no contract," and held that the motion should have been sustained. It was claimed that the owner ought to have agreed to the change that was proposed by the contractor. The court said: "If so changed, it would have been a new contract involving new bids for the work. The defendants were not obliged to make a new contract with the plaintiffs." In that case, the contract made no provision for its modification. If the contract as entered into had been performed, its violation of the city ordinance would have followed. If the contract had been changed so as not to violate the ordinance, the change would necessarily have resulted in the making of a new contract. The change made in the contract in suit was made by virtue of the original contract, and the agreement for a change is made in the execution of the original contract. *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669, involved a building contract, and the claim of the sureties to be released because of changes that had been made in the doing of the work from the manner pro-

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vided in the contract. The case is in point upon two propositions. (1) While the obligations of sureties is *strictissimi juris*, the rule of construction to be applied in the construction of suretyships is the same that is to be applied in the construction of contracts in general. (2) That the provisions in a contract for changes bind the sureties the same as principals, and that by virtue of such provisions the sureties are to be held to have consented in advance to the making of all such changes as are within the terms of the stipulations. In the course of the opinion, the court said: "It should also be observed that there is a clause in the contract the material part of which reads as follows: 'Should the owner at any time during the progress of his said work request any alterations, deviations or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract.' The defendant having by reference in effect made the contract a part of the bond, must be deemed to have assented to this provision and to any changes or deviations in the performance of the contract made under it. She has, in effect, guaranteed the performance of the written contract between other parties, which by its terms permitted the parties to change it or deviate from it. While it is not important to consider the real scope of this clause since we preferred to dispose of the question in the case upon the grounds that there is no material departure from the contract when properly construed, it should be noted that she consented in advance to changes of some character which are permitted by the contract in language quite broad and comprehensive." To the same effect are the cases of *Howard County v. Baker*, 119 Mo. 397, 24 S. W. 200; *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Hayden v. Cook* (Neb.), 52 N. W. 165; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *American Surety Co. v. Lauber*, 22 Ind. App. 326; *Young v. Young*, 21 Ind. App. 509.

By the terms of the bond, the stipulation of the contract

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becomes a part of it, and appellees Higgins and McDaniel become parties to the stipulation which provides for changes in the contract without a violation of the same. They agreed in advance to necessary changes. The contractor of the building under the supplemental agreement is fully within the terms of the original agreement. The only effect of the change was to eliminate the element of illegality and make it possible to carry it out without the violation of the city ordinance. We think the decision was supported by sufficient evidence and was not contrary to law.

The fifth, sixth, and seventh reasons for a new trial relate to the admission in evidence of the original complaint, the supplemental contract and the plans and specifications by appellees to be a part of the contract. Holding that the change in the contract was made in accordance with the changes provided for in the contract to which appellants were parties, we must hold that these reasons were not valid.

The ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth reasons for a new trial relate to the admission in evidence of the testimony of appellee Mary Quigley as to certain payments which she made to appellants Olive and Long. It is claimed that there was no proof that the payments offered to be proved were made under the contract; that the contract provided that only seventy-five per cent. was to be paid as the work progressed, and that it had not been shown that any estimate of the architect had been made so as to entitle appellees to make the payment. Mary Quigley testified that she made the payments under the directions of the architect; that she went to him every day and saw him about it and how much was paid and kept an account of it. Winterrowd, the architect, testified that he visited the house "almost every day or probably every other day," and whenever payments were made knew that they were not going beyond the contract price, and that they were made on his estimates. The contract did not require estimates to be made in writing. He also directed Mrs. Quigley to pay

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off all bills approved by the contractors. The architect also testified that there had been paid, when the last payment was made, less than \$700, about \$650, and that at that time they had done work amounting to more than that amount; the amount paid was less than the seventy-five per cent. of the contract price, which would be \$1,500, which appellees were authorized to pay in advance of the completion of the work.

The sixteenth reason for a new trial is found in the refusal of the court to permit appellants to ask appellee, Mary Quigley, on cross-examination whether or not the building as constructed was frame. It was properly excluded because it was not proper cross-examination. Her testimony in chief had been confined to her payments and the time when the building was completed. For a like reason, it was not error in cross-examination to refuse appellants to prove by Mary Quigley whether the labor and material she had paid for was not furnished upon a contract subsequent to the original contract. It was not error to refuse to permit like proof upon cross-examination as to painting that was done and to painting materials, constituting the sixteenth and eighteenth reasons for a new trial.

The twenty-first, twenty-second, and twenty-third reasons for a new trial relate to the admission of the testimony of the witness Winterrowd as to what proportion in lumber, labor, and material involved in the change from a brick to a wood structure the contract as executed bore to the contract as originally made for a brick structure. Questions intended to elicit this information were put to the witness in various forms, but we do not find that they were answered, except as follows: The witness was asked to state the cost of putting up the half story in brick. An objection to the question was overruled, and the witness answered that he could not tell the relative cost without making a calculation, but that the brick would cost more than the frame; that it would take brick masons longer to build the same wall than it

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would take to build one of frame, and laborers on brick are higher priced than carpenters. The answer was so indefinite and so lacking in information that it could not have harmed appellant.

The twenty-sixth reason for a new trial is based upon the refusal of the court to allow the appellant McDaniel to testify that the change in the character of the building from a brick to a frame was made without his knowledge or consent. The court correctly sustained the objection upon the ground that it assumed that the building had been changed from a brick to a frame, a fact which was denied. The witness Winterrowd had, in answer to questions propounded by appellants' counsel, described the character of the building as constructed. The witness was then asked to "state whether or not this is a distinct style of construction." The court sustained the objection to the question, and counsel stated, we "offer to prove that a building the first story of which is composed of brick or stone with a second story of frame or wood and shingles is a distinct style of architecture, differing from a frame building or from a brick building." In adhering to the ruling, the court correctly said the "proposition was self evident, one being of wood and the other of brick." The foregoing are all the specifications of error discussed.

A careful consideration of the interesting questions so ably presented by counsel, and of the numerous authorities cited, lead us to the conclusion that the changes made were reasonable and authorized by the terms of the contract, and that the trial court committed no error for which the judgment should be reversed. Judgment affirmed.

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MILLER v. STEVENS.

[No. 2,878. Filed November 24, 1899.]

BROKERS.—Commission.—Complaint.—Quantum Meruit.—A complaint upon the *quantum meruit* to recover a commission for services as a broker which alleges that plaintiff, at the special instance and request of defendant, procured a purchaser for a large general stock of merchandise, owned by defendant, which defendant desired to sell, and in all things complied with the request of defendant, is sufficient as against a demurrer, although it is not alleged that the purchaser was ready, willing, and able to purchase the stock, or that a sale was completed before the action was commenced, or prevented by defendant. pp. 365-371.

SAME.—Commission.—Agreement to Furnish Purchaser.—Where a broker is instrumental in bringing the owner of property and a purchaser together, and a sale or exchange is effected, the broker is entitled to a commission under a contract to furnish a purchaser to his principal. p. 371.

VERDICT.—Answers to Interrogatories.—Conflict.—The general verdict must stand as against answers to interrogatories, unless the answers are in irreconcilable conflict with the general verdict. p. 372.

INSTRUCTIONS.—Harmless Error.—A judgment will not be reversed because one or more instructions given, when standing alone, were erroneous, where, construing all the instructions together, it is apparent that the jury was not misled, and it affirmatively appears that the verdict was right upon the evidence. p. 374.

TRIAL.—Venire de Novo.—Before a motion for a *venire de novo* will lie, the verdict or finding must be so defective that no judgment can be rendered thereon. p. 375.

SAME.—Venire de Novo.—The failure to find material facts in a special finding or verdict is not cause for a *venire de novo*. p. 376.

From the Carroll Circuit Court. *Affirmed.*

J. C. Farber, for appellant.

R. P. Davidson, A. Boulds, M. A. Ryan and W. R. Moore, for appellee.

WILEY, J.—This was an action by appellee to recover from appellant a commission for services as a broker. The complaint is in two paragraphs. The first is a common count upon the *quantum meruit*, wherein it is averred that appel-

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lee, at the special instance and request of appellant, procured a purchaser for a large general stock of merchandise owned by appellant, and which he desired to sell. In this paragraph it is averred that appellee did procure and furnish such purchaser, and in all things complied with the request of appellant. The second paragraph counts upon an alleged special agreement, whereby appellant, as is alleged, agreed to pay appellee a commission of \$500 for procuring a purchaser for appellant's stock of goods, such commission to be paid as soon as the sale was completed. This paragraph alleges that appellee did furnish such purchaser, to whom appellant did sell his entire stock of goods, amounting to over \$20,000 in the aggregate. In this paragraph some correspondence between appellant and appellee is set out.

Appellant moved to make the first paragraph more specific, and to strike out parts of the second. These motions were overruled and exceptions reserved. A demurrer to each paragraph of complaint was overruled. The issue was joined by an answer in general denial, and a trial by jury resulted in a general verdict for appellee, and with the general verdict the jury made special findings of fact by way of answers to interrogatories. Appellant's motion for judgment on the answers to interrogatories, motion in arrest of judgment, for a new trial, and for a *venire de novo*, were each overruled. All these adverse rulings are assigned as errors.

It is a conceded fact that all the negotiations between appellant and appellee were in writing, and such writing consisted wholly of letters and telegrams exchanged between them.

Before taking up the questions for discussion as they are presented by counsel, a brief reference to the contents of these letters etc. will be profitable. On April 8, 1897, appellant addressed a postal card to the Bank of Wisconsin, at Madison, in which he stated that he had a stock of goods that would invoice \$18,000 to \$20,000; that he was in poor

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health and would dispose of the goods for good real estate and some cash; and that he had an established cash trade. The card closed as follows: "Should this not interest you, please hand this to your friends that may want an opportunity of this kind." The bank handed this card to appellee, who wrote appellant on April 13th. In that letter, appellee stated that he had made the real estate business a specialty for twenty years and that he had sold and exchanged several stocks of merchandise. After this statement the letter continues as follows: "If you have a nice clean stock as stated in your postal, I can get you a purchaser for it, if you will make it an object to the purchaser. Please state the very best discount you will give on the entire stock; also how long you have been in business, and how much of this stock is shelf worn and out of date. Will you pay me a cash commission of three per cent. of the gross amount of your sale, if I send you a purchaser who will purchase your stock. No sale no charge. If so, and you are disposed to make it an object to the cash purchaser, I will send you a man to buy you out as soon as I hear from you." In this letter inquiry was made as to the population of Frankfort, Indiana, where appellant's stock was; how far it was from Chicago, and how much rent would have to be paid for a store as occupied by appellant. April 14th appellant replied to appellee's letter, in which he said that he had a nice general stock in the lines as indicated by his letter-head; that he had an established cash trade; that he was partially paralyzed and had lost his right eye; that he was unable to attend to business; that he had a good location on the public square; that his rent was \$40 per month. In this letter he gave the population of Frankfort at about 9,000, and the distance from Chicago as 135 miles. The letter closed as follows: "Business can be continued here or stock can be moved. I will take \$12,000 to \$15,000 in clear real estate, balance cash, or will give twenty per cent. discount for all cash. I am willing to pay you a cash commission as soon as deal is

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completed and property has changed hands." April 15th appellee replied to appellant's letter, in which he said that the offer made was a liberal one, but that he first wanted to see if he could make a cash sale. * * * The letter then contained the following: "The purchaser I have in view for you has bought a good many purchases of this kind and he has had all the way from twenty-five to fifty per cent. discount. If you think you would entertain an offer of thirty per cent. discount of the wholesale price, I think I could induce him to go down and look you over, but first of all I would not make a sale of the size for \$350, for I have too many opportunities to make just such sales where they pay all the way from three to five per cent. commission." The letter then stated he would make the sale for three per cent. and closed as follows: "If this meets your approval I will have my man come down and see you, and if your stock is what I imagine it should be, there is no doubt your being able to make a cash sale to him. * * * Should you fail to sell outright to him, I will then see what I can do for you in the way of exchange, but no doubt you prefer cash. Will you also state what portion of your stock is dry goods, what portion of clothing, what portion of boots and shoes, what portion of hats and caps and what portion of millinery. Whatever is done must be done very quickly as my man is contemplating another large purchase." April 16th appellant replied to this last letter as follows: "I will pay you \$500 com. on a cash sale, payable and due as soon as deal is completed and property has changed hands. Send your man down and I will do my best to make a sale. Not having invoiced it is hard for me to make an estimate of each line, but as you say your man buys stocks of goods, he no doubt knows what a general stock is. I only carry the kinds and different lines of goods indicated by my letter-head. If he comes please let me know in advance." April 22nd appellee replied to this last letter, accepting the offer of appellant, disclosed the names of his customers, and sends

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them to Frankfort, and notified appellant by telegram when they would arrive. In this letter appellee said: "I saw the gentlemen whom I have been writing you about, and I think they will buy your stock of merchandise, and last evening, about nine o'clock, they decided to go down and look your stock over, and purchase it if it suited them, and you and they could agree on the price. * * * They are close dealers, but I am satisfied you can sell to them if you handle them right." Before the persons with whom appellee had been negotiating left Madison, Wis., for Frankfort, Ind., to examine the stock of goods and see if they could purchase it, appellee gave them a letter of introduction to appellant. In this letter he said: "This will introduce to you David Davis and Melanchton M. Welton * * * the gentlemen who I wrote you would buy your stock of merchandise, if it suits them, and you and they can agree on price." Appellee also telegraphed appellant that the intended purchasers for his stock had left for Frankfort.

Appellant urges four objections to the first paragraph of complaint: (1) That it does not allege sufficiently an employment of appellee by appellant; (2) that it does not allege that any sale was made or that a sale was not made because of the fault of the appellant; (3) it is not alleged that the purchaser was ready, willing and able to purchase appellant's stock of goods, and (4) that it is not alleged that a sale was completed before the action was commenced, or that a sale was prevented by appellant. We do not think any of these objections are well taken. This court, in *Cannon v. Castleman* (Ind. App.), 55 N. E. 111, held a complaint for a broker's commission, similar but less formal, sufficient, and on the authority of that case, we must hold that the first paragraph of complaint was sufficient against a demurrer, and that there was no error in overruling the demurrer to it.

The second paragraph proceeds upon the theory that appellee furnished to appellant a purchaser to whom he

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made his own sale. There is a marked difference between a contract by a broker to furnish a purchaser to his principal and a contract to effect a purchase or sale. In the first instance the broker has earned his commission when he has introduced and brought together the principal and the proposed purchaser between whom a deal is perfected, and in the second instance it is the duty of the broker to perfect a sale upon the prescribed terms submitted to him by the principal before he is entitled to his commission. The postal card and letters above referred to must be regarded as constituting the contract between appellant and appellee, and to determine just what that contract was, we must look to the entire correspondence and construe it together. By a postal card, appellant informed appellee that he had a large stock of merchandise worth about \$20,000, which he desired to sell or trade, and that he would take good real estate and some cash. Appellee then wrote appellant inquiring about his stock, asked if he would pay a commission of three per cent. if he would send him a purchaser, and that he would send him a purchaser to buy him out as soon as he heard from him, etc. In response to this letter, appellant informed appellee that he would take \$12,000 to \$15,000 in clear real estate and balance cash, and that he would pay him a commission of \$350. Appellee declined to undertake to find a purchaser for \$350 commission, but insisted on receiving three per cent. Referring to appellant's offer to take part real estate, he said to him that he would first try and see if he could not make it a cash deal. Appellant replied that he would pay a commission of \$500 on a cash sale, and asked appellee to "send your man down and I will do my best to make a sale." Construing this correspondence together, as constituting the contract between the parties, it is clear to us that appellant agreed to pay appellee a commission of \$500 if the latter should find him a purchaser to whom a sale might be made. This contract does not specify any definite terms upon which the sale was to be made.

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While there are some sentences in the correspondence which indicate that appellee was trying to find a cash purchaser, yet there is much in it that shows that appellant was willing to sell for part cash and part in real estate. It is shown by the complaint that appellee did furnish to appellant purchasers to whom he sold his stock of goods, fixtures, etc., upon his own terms. It seems to us that the contract was plain and clear, and that the second paragraph of complaint contained all necessary averments to constitute a cause of action. If a broker who has property for sale is instrumental in bringing the owner of the property and a purchaser together, and a sale or an exchange is effected by the parties in interest, the broker will be entitled to his commission. *Cox v. Haun*, 127 Ind. 325; *Barnett v. Gluting*, 3 Ind. App. 415; *Clifford v. Meyer*, 6 Ind. App. 633; *Platt v. Johr*, 9 Ind. App. 58; *Lockwood v. Rose*, 125 Ind. 588; *Haug v. Haugan*, 51 Minn. 558, 54 N. W. 874; *McFarland v. Lillard*, 2 Ind. App. 160.

In New York it was held that a broker was entitled to compensation if a sale was consummated through his agency as the procuring cause; and that if his communications with the purchaser were the cause or means of bringing him and the owner together and the sale resulted in consequence thereof, the broker could recover. *Lloyd v. Matthews*, 51 N. Y. 124.

In Missouri, it was held that a broker who introduced a purchaser to his principal, or gave his name, so a sale is effected by the owner, though on different terms than first contemplated, such broker is entitled to his commission. *Henderson v. Mace*, 64 Mo. App. 393.

If we keep in view the distinction between a contract of a broker to make a sale of his principal's property upon prescribed terms, and his contract to furnish his principal a purchaser to whom the principal sells upon his own terms, the solution of the question we are now considering becomes easy.

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While the second paragraph of complaint is not a model pleading, it nevertheless states a cause of action, and there was no error in overruling the demurrer to it. Appellant next discusses the overruling of his motion for judgment on the answers to interrogatories.

A careful examination and consideration of the answers to interrogatories leads us to the conclusion that such answers are not in irreconcilable conflict with the general verdict. In such case, the general verdict must stand. In the correspondence between the parties something was said about a discount from the wholesale price of twenty per cent., and thirty per cent. for cash, but it is clear that no definite agreement was made upon that basis. The interrogatories attempt to elicit the fact that such contract was made and that the purchasers refused to purchase on such terms. By their answers, the jury found that no such contract was made. We are unable to find any conflict between the general verdict and the answers to interrogatories.

. Appellant's motion for a new trial contained seventeen causes, and, in the order of discussion, the overruling of such motion will now be considered. The first cause assigned is that the verdict is not sustained by sufficient evidence; the second, that the verdict is contrary to law, and third that the verdict is contrary to the law and the evidence. These may be considered together, and can be disposed of in few words. To our minds, the evidence is clear and convincing, and fully sustains the verdict. In fact, we do not see how the jury could have reached a different conclusion. The evidence disclosed the fact that appellant occupied two business rooms in Frankfort, which adjoined each other and were connected by an opening between them. Appellant attempted to show that the stock of goods in one of the rooms was the one he had reference to in his letters to appellant, and that the stock in the other room was not included. We think the evidence fairly shows that the goods in both rooms constituted one stock, and it is clear both from the letters

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and the evidence of appellee that he had no knowledge that he was to send a purchaser to buy the goods in any specified room. It is true that the evidence shows that appellant tried to sell the stock of goods that was in one of the rooms to the purchasers sent by the appellee, but they refused to purchase it upon the terms asked, and a trade was finally made for the entire stock in both rooms, except that \$4,000 in value of goods was invoiced back to appellant. For the goods purchased, appellant received in cash \$—— and a tract of land valued at \$1,600. Appellant rested his defense upon two basic propositions: (1) That the stock of goods he meant to offer for sale was the one in the south room; (2) that the appellee undertook to furnish him a purchaser to buy that stock at thirty per cent. discount from the wholesale price. Neither of these propositions is supported by the evidence. Appellant and appellee lived in different states; they were entire strangers; all that appellee knew about appellant's stock of goods he learned from the postal card and the letters written by appellant, and there is certainly nothing in them that even intimates that the stock appellant wanted to sell was in the south room. On the contrary, the postal card sent to the bank and by it turned over to appellee would indicate that appellant wanted to dispose of all his stock and make a change in his business. In it appellant said: "I have a general stock of goods, will invoice \$18,000 to \$20,000 * * * established trade, poor health, must make change." Again in a letter he said that he was paralyzed and unable to attend to business. It is enough to say that these letters clearly convey the idea that appellant wanted to dispose of his entire stock of goods and quit business, and it is unquestionably the fact, shown by the letters and the evidence, that appellee had no knowledge that appellant occupied two rooms, and that what he wanted to sell was in the south room. While it is true some mention was made in the correspondence about a discount of twenty per cent. or thirty per cent. on the wholesale price, yet no con-

tract or agreement between appellant and appellee was made that appellee would furnish a purchaser upon such terms. The evidence is uncontradicted that appellee did not inform the purchasers that they were to buy at any specified price or fixed discount, and it is shown that they went to Frankfort without knowing what price they were to give. It is also shown that they called upon appellant to look his goods over and to purchase his stock at such price and upon such terms as they could make with him. This they did, and there is no question but through the agency of appellee, as the procuring cause, the sale was made. The evidence fully sustains the verdict.

From the fourth to the eleventh causes, inclusive, assigned in appellant's motion for a new trial, the action of the court is challenged in giving, refusing to give, and modifying and giving as modified certain specified instructions. By these several causes assigned in his motion for a new trial, some eighteen instructions are brought to our attention for review. Many of these are quite lengthy, and a detailed discussion of them would require much time and extend this opinion to an unreasonable length without serving any corresponding useful purpose. A careful study and consideration of all the instructions lead us to the conclusion that the trial court fairly and fully instructed the jury as to the law applicable to the facts as disclosed by the evidence, and that there was no error in giving, refusing to give, and modifying and giving as modified, any of the instructions upon which reversible error can be predicated. Construing all the instructions together, we feel justified in saying that it is apparent the jury was not misled, and in such case, though one or more of the instructions standing alone might not have been correct, the judgment should not be reversed for such reason. *Chapple v. Davis*, 10 Ind. App. 404; *Kepler v. Jessup*, 11 Ind. App. 241; *Shields v. State*, 149 Ind. 395. While we can not approve some of the instructions standing alone, as correct statements of the law, yet it affirmatively appears

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to us that the verdict was right upon the evidence, and this being true, we are not warranted in reversing the judgment on account of such erroneous instructions. *Woods v. Board, etc.*, 128 Ind. 289; *Swaim v. Swaim*, 134 Ind. 596; *Garrigan v. Dickey*, 1 Ind. App. 421; *Shields v. State, supra*; *Mode v. Beasley*, 143 Ind. 306; *Stanley v. Dunn*, 143 Ind. 495; *City of Lafayette v. Ashby*, 8 Ind. App. 214; *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206; *Island Coal Co. v. Neal*, 15 Ind. App. 15.

Appellant's sixteenth reason assigned for a new trial is for alleged errors of law occurring upon the trial, and is divided into seventeen subdivisions, all of which relate to the introduction and rejection of evidence. Our attention has been called to the several matters complained of by counsel in his argument, but we are unable to see that any reversible error was committed by the trial court in admitting and rejecting the evidence complained of.

Appellant's seventh specification in his assignment of errors is that the court erred in overruling his motion for a *venire de novo*. This motion was in writing and was based upon the alleged ground that the "verdict * * * is so ambiguous and uncertain that no judgment can be rendered thereon." Before a motion for a *venire de novo* will lie, the verdict or finding must be so defective that no judgment can be rendered thereon. *Zink v. Dick*, 1 Ind. App. 269; *Chicago, etc., R. Co. v. Barnes*, 2 Ind. App. 213; *Evansville, etc., R. Co. v. Taft*, 2 Ind. App. 237; *Knight v. Knight*, 6 Ind. App. 268; *Case v. Ellis*, 9 Ind. App. 274; *Waterbury v. Miller*, 13 Ind. App. 197; *Seiberling v. Tatlock*, 13 Ind. App. 345; *Garrett v. State, ex rel.*, 149 Ind. 264.

It is perfectly clear that the general verdict is neither uncertain nor ambiguous, and appellant does not urge any objections to it. It is argued, however, that the answer to interrogatory three is ambiguous and uncertain, and it is upon that answer that the motion for a *venire de novo* is based. That interrogatory is as follows: "Did defendant

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and plaintiff have any other contract in relation to the sale of defendant's goods except the one wherein defendant agreed to pay plaintiff \$500 for furnishing him a purchaser who would pay him seventy per cent. of the cost price of his goods?" The answer was: "We find no contract for seventy per cent." Before the discharge of the jury, appellant moved the court that the jury be required to re-answer the interrogatory, which motion the court overruled. It is urged that the interrogatory was direct and pertinent; that it might have been answered directly, and that the answer is evasive and not responsive. Grant this to be true, and still the failure of the jury to answer the question directly is not a ground for a motion for a *venire de novo*. The failure to find material facts in a special finding or verdict is not cause for a *venire de novo*. *Jones v. Casler*, 139 Ind. 382; *Waterbury v. Miller*, *supra*; *Durflinger v. Baker*, 149 Ind. 375. There was no error in overruling the motion.

Appellant urges that the court erred in overruling his motion in arrest of judgment. What we have said as to the sufficiency of the complaint disposes of this question adversely to appellant. This disposes of every question discussed by appellant's counsel.

We do not find any reversible error in the record, and the judgment is affirmed, with ten per cent. damages.

DAVIS ET AL. v. O'BRYANT ET AL.

[No. 2,928. Filed November 24, 1899.]

BONDS.—Signature.—Not Signed by All the Parties Named in Body of Bond.—Demurrer.—The fact that a part of the persons named in the body of a bond did not execute it is not ground for a demurrer in an action against those who did sign it, but must be pleaded as a defense. *p. 377.*

SAME.—Signature.—Delivery.—Principal and Surety.—Where a bond contains the names of other obligors, and is delivered without the signatures of all, the obligee must inquire whether those who have signed it consent to its delivery without the signatures of the others;

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but if there is nothing on the face of the bond to indicate that others are to sign it, and the bond is accepted on the faith of appearances, without notice that it is not to be delivered in its then shape, the party signing cannot question the validity of the delivery. pp. 377, 378.

BONDS.—Signature.—Delivery.—Principal and Surety.—Where a surety signs a bond which is to be signed by another, whose name appears in the bond as coöbligor, and the bond is delivered without such other person having signed it, and without the consent of the one who signed it, the delivery is a nullity, and the surety is not bound. p. 378.

From the Madison Circuit Court. *Affirmed.*

J. W. Vermillion, M. A. Chipman, S. M. Keltner and E. E. Hendee, for appellants.

W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellees.

ROBINSON, J.—Suit by appellees upon an appeal bond. In the body of the bond appear the names of three obligors, and only two of them signed it. The complaint shows the bond was filed and duly approved and the appeal taken. A complaint against those who did sign it, although a third obligor is named in the bond, is good against a demurrer for want of facts. The fact that a part of the persons named executed it, and part did not, is not ground for demurrer for want of facts, but must be pleaded as a defense. There is nothing on the face of the bond to show it was a conditional delivery, but from the bond itself the delivery purports to have been absolute. *Pawling v. United States*, 4 Cranch 217. In *Fletcher v. Austin*, 11 Vt. 447, and *Sharp v. United States*, 4 Watts. 21, 28 Am. Dec. 676, the question was raised by answer. See *Covert v. Shirk*, 58 Ind. 264; *Wild Cat Branch v. Ball*, 45 Ind. 213.

If a bond contains the names of other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signature of the others. In such case the party signing may question the delivery. But if there is nothing on the face of the bond or otherwise to indicate

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that others are to sign it, and the bond is accepted on the faith of appearances, without notice that it is not to be delivered in its then shape, the party signing can not question the validity of the delivery. *Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73; *Deardorff v. Foresman*, 24 Ind. 481.

If a surety signs a bond which is to be signed by another whose name appears in the bond as coöbligor, and the bond is delivered without such other person having signed it, and without the consent of the one who has signed, the delivery is a nullity and such surety is not bound. *Allen v. Marney*, 65 Ind. 398; *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. 271; *Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560.

This question of fact was presented in the case at bar by the issues formed by the answer and reply. The court heard the evidence, and we can not disturb the conclusion reached without weighing the evidence. There is evidence from which the court could conclude that the surety consented to the filing of the bond without the signature of the other obligor named in the bond and that he approved the filing of the bond without such signature.

Judgment affirmed.

THE STATE, EX REL. FISHER, v. CAREY.

[No. 2,956. Filed November 24, 1899.]

INSTRUCTIONS.—Evidence.—An objection to an instruction as not being applicable to the evidence is not available where there was some evidence on the question to which it was directed. *p. 379.*

SAME.—Bastardy Prosecution.—Credibility of Relatrix as a Witness.—No error was committed in instructing the jury in a bastardy prosecution that in determining the credibility of the prosecuting witness the jury might take into consideration her interest in the result of the suit, but the fact that she was the prosecuting witness would not permit them to give her evidence any less or greater weight than if they were considering her evidence in a case of another kind in which she might be interested. *pp. 379, 380.*

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From the Hamilton Circuit Court. *Affirmed.*

Robert Denny and Joel Stafford, for appellant.

S. D. Stuart, C. G. Reagan, J. A. Roberts and M. Vestal, for appellee.

COMSTOCK, C. J.—Appellee was prosecuted in the court below for bastardy. The trial resulted in a verdict and judgment in his favor. The action of the court in overruling appellant's motion for a new trial is the only error assigned on this appeal, and the giving to the jury of instructions, and each of them, numbered respectively one, five, and eight, requested by appellee and which are stated as reasons for a new trial in the motion are alone discussed; others are therefore waived. The objection to instruction number one is that it is not applicable to the evidence. An examination of the record discloses that there is evidence on the question to which it is directed, and therefore, however slight or unsatisfactory that evidence may have been, it was not error to give it.

The fifth instruction told the jury that in determining the credibility of the prosecuting witness they might take into consideration that she was interested in the result of the suit, but that the fact that she was the prosecuting witness would not permit them to give her evidence any less or greater weight than if they were considering her evidence in a case of another kind in which she might be interested. It is claimed that this instruction invades the province of the jury in undertaking to measure the interest of the relatrix in the result of the suit. The instruction tells the jury that the relatrix is interested in the result of the suit, which was not improper, (*Keating v. State*, 44 Ind. 449); that they *may*, not that they *must*, take the fact into consideration as affecting her credibility, thus indicating that it was their right, not their duty, to consider such fact. This form of instruction is uniformly approved. From the latter clause, the jury could only have understood that the credibility of a witness should

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not depend upon the character of a cause in which she testified. We are unable to see that this instruction was prejudicial to appellant.

The eighth instruction relates to evidence introduced on behalf of appellee to prove an alibi. It is claimed that the court commented on that part of the testimony given in favor of appellant, and did not refer to all the testimony given in reference to the alibi attempted to be proved by appellee; and that the court failed in that and in every other instruction to tell the jury that they were the exclusive judges of the facts proved. Counsel are in error in stating that the jury were not told that they were the exclusive judges of the facts proved. They were so instructed in charge number eight of those requested by appellant. We do not find that the court commented upon the testimony in favor of appellant. The instruction informed the jury that the defendant had introduced evidence for the purpose of proving that he was not with the relatrix at the date of her conception as claimed by her, and concluded with the following statement "these are matters together with all the evidence given in the case you may consider in determining whether or not the defendant is the father of the relatrix's child." We do not find the instruction open to the objections urged.

Judgment affirmed.

BRADLEY, HOLTON & COMPANY v. WHICKER.

[No. 2,863. Filed November 29, 1899.]

APPEAL AND ERROR.—Bill of Exceptions.—Signature of Judge.—Presumption.—Where the record shows that a bill of exceptions was signed by the judge and filed, it will be presumed that the judge signed the bill and that it was then filed. p. 381.

BILLS AND NOTES.—Action by Indorsee.—Burden on Plaintiff to Show that He is a Bona Fide Holder.—In an action on a promissory note by an indorsee the burden is upon plaintiff to show that he is a *bona fide* holder, which includes proof that he obtained the note without notice of any defense, and the plaintiff may assume this burden in his complaint. pp. 381-383.

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BILLS AND NOTES.—Transfer.—Presumption.—Nothing appearing to the contrary, it will be presumed that a note was transferred on the day of its date. *p. 383.*

APPEAL AND ERROR.—Assignment of Cross-Errors.—No question is presented on an assignment of cross-errors where it does not appear when the assignment was made. *p. 384.*

From the Tipton Circuit Court. *Reversed.*

W. R. Oglebay and *J. L. Oglebay*, for appellant.

Dan Waugh, *J. P. Kemp* and *J. N. Waugh*, for appellee.

ROBINSON, J.—Appellant sued appellee on a promissory note payable in a bank in this State. Appellee had judgment. Overruling appellant's motion for a new trial is assigned as error.

Appellee's counsel argues that no question is presented because the bill of exceptions containing the evidence is not properly in the record. The bill was presented to the judge June 11th, and signed and ordered made part of the record June 14th. The record recites that on June 14th "Comes now the plaintiff and files her bill of exceptions number two." The clerk certifies that the bill was filed on that day. It was filed within the time allowed. There was no bill of exceptions until it was signed by the judge. *Galvin v. State*, 56 Ind. 51. We can not presume that the clerk certified what was untrue. From the record entry and clerk's certificate but one inference is permissible, and that is that the judge signed the bill and it was then filed. This same question was presented in *Martin v. State*, 148 Ind. 519, and the bill held to be in the record.

The complaint avers that the note, which is payable in a bank in this State, was indorsed by the payees, before due, and for value, to appellant, who took it in the usual course of trade and without any notice of any defense. The note is payable to order in a bank in this State, and is, therefore, negotiable as an inland bill of exchange. §7520 Burns 1894.

The fourth paragraph of answer alleges, in substance, that

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the note was executed for the purchase price of a buggy, which the payees falsely and fraudulently represented to be new, and of the value named in the note; that in truth the property was old and second-hand and worth not to exceed a named sum; that it had been newly painted and varnished so that its real condition could not be observed; that appellee having no knowledge of its value or that it was old, of which the payees of the note well knew, but relying upon the false and fraudulent representations so made, and believing them to be true, executed the note; that immediately upon discovery that the property was old, and of the fraud perpetrated upon her, she delivered it back to the payees, who at the time held the note, and demanded the note, which they refused to surrender; that appellant did not pay a valuable consideration for the note, did not purchase it before maturity, and had full knowledge at the time of the purchase of the note of this defense.

This court has held in *Bunting v. Mick*, 5 Ind. App. 289, that if a plaintiff in a case like this avers that he held the note in good faith, obtained it before maturity for a valuable consideration, and without notice of any defense on the part of the maker, the defendant must meet this in his answer; and if the maker answers with a defense against the payee and also pleads facts denying plaintiff's want of notice, it would be good against a demurrer. The same case also holds that, if the plaintiff fails to aver that he took the note without notice of any defenses on the maker's part, the defendant need not allege in his answer that the plaintiff had notice of such defenses. If the plaintiff says nothing about want of notice, and the defendant pleads fraud against the payee, the plaintiff must reply want of notice. That is, from the case of *Bunting v. Mick*, *supra*, and the cases cited in that opinion, the rule is that the burden is on the plaintiff to show that he is a *bona fide* holder, and that this includes proof that he obtained the note without notice of the defense. And we take it that the plaintiff may assume this burden in

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his complaint, as he did in the case at bar. See, also, *Galvin v. Bank*, 129 Ind. 439; *Bank v. Ruhl*, 122 Ind. 279; *Giberson v. Jolley*, 120 Ind. 301; *Bowser v. Spiesshofer*, 4 Ind. App. 348.

That the verdict is not sustained by sufficient evidence, and is contrary to law, are among the reasons given for a new trial. There is absolutely no evidence in the record that appellant purchased the note with knowledge of the fraud by the payees against the maker. Two witnesses testify that the note was purchased without any notice of any kind of any defense on the part of the maker. Nor is there any evidence of any circumstances that show that appellant refrained from making any inquiry lest it should become acquainted with the transaction out of which the note originated, nor are there any circumstances which would excite suspicion, thus imposing on the purchaser the duty to make inquiry at the time of the purchase. The evidence is undisputed that the note was indorsed and delivered to appellant before maturity; that appellant took the note at its full face value, without any notice of any defense. The only thing in the record that in any way contradicts any of this evidence is the evidence of one witness who testified that one of the payees of the note told witness after the note was due that the other payee then had the note. This is the only testimony that tends in any way to show that the note was not transferred until after due. But this was clearly hearsay, and, although not objected to, is not sufficient to support a verdict. There are no circumstances shown from which a jury could legitimately infer that the transfer was after maturity. Nothing appearing to the contrary, it is presumed such a transfer is made at the date of the note; and the only evidence on that point in the case at bar is that it was transferred before due.

There is no evidence upon which to base an instruction to the effect that, if the jury believed from the evidence that the note was fraudulently procured from appellee, and that

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the payees indorsed it to appellant before due, for the purpose of appellant holding the same as the ostensible owner, but in fact to accommodate the payees, and thereby avoid and defeat the defense of appellee, then appellant would not be a good-faith holder, and the defense could be as effectually made against the note in appellant's hands as in payees', and if the note was fraudulently procured, as claimed by appellee, their finding should be for appellee. Nor was there any evidence to support an instruction that appellant would not be a good-faith purchaser, "If you believe that the plaintiff, at the time of the purchase of the note, was in possession of such facts which were sufficient to excite suspicion as to the good-faith execution of said note, but fraudulently and purposely refrained from making inquiry lest it would discover the true character of the transaction out of which said note originated and was given, or, in other words, ascertain the facts constituting the defendant's defense herein."

The record shows the assignment of cross-errors, but as it does not appear when that was done no question is presented. It is not shown that there has been a compliance with rule four of this court. *Cohoon v. Fisher*, 146 Ind. 583, 36 L. R. A. 193.

The motion for a new trial should have been sustained. Judgment reversed.

SCHERER v. SCHERER.

[No. 2,900. Filed November 29, 1899.]

HUSBAND AND WIFE.—Separation and Separate Maintenance.—Contracts.—A contract entered into by husband and wife, who were living apart by mutual consent, providing a specific sum, payable monthly, for the support of the wife, is without consideration, and cannot be enforced.

From the Ohio Circuit Court. *Reversed.*

J. B. Coles, for appellant.

O. F. Roberts and *S. H. Stewart*, for appellee.

Scherer v. Scherer.

COMSTOCK, J.—The complaint avers in substance that appellant and appellee were married in April, 1896, and continued to live together as husband and wife until the 30th of July of that year, at which date they separated. On the 1st of September, 1896, they entered into a written contract, made a part of the complaint, in which, among other things, it was stipulated "that for the purpose of providing a support for appellee, appellant agreed to pay her for her maintenance \$10 per month on the first day of each month, commencing on said 1st day of September. Pursuant to this agreement, appellant paid her three monthly instalments, amounting to \$30, and no more. At the commencement of this suit there was due appellee fourteen monthly instalments amounting to \$140. A demurrer to the complaint for want of facts was overruled. Appellant answered in two paragraphs; the first set up affirmative matter; the second was a general denial. A demurrer was sustained to the first paragraph upon the ground that it did not contain facts sufficient to constitute a defense to the plaintiff's cause of action. The trial resulted in a judgment in favor of appellee for \$140. Upon this appeal, appellant assigns as error the action of the court (1) in overruling the demurrer to the complaint; (2) in sustaining the demurrer to the first paragraph of answer. Believing the complaint insufficient, we do not pass upon the sufficiency of the answer.

The contract in question is in the following language: "This agreement made this 1st day of September, 1896, by and between John L. Scherer of Ohio county, in the State of Indiana, and Anna Scherer of Dearborn county, in the State of Indiana, Witnesseth: That whereas said John L. Scherer and Anna Scherer are husband and wife, but have lived apart since the 30th day of July, 1896, by reason of the abandonment one of the other; and whereas said Anna Scherer is about to commence an action for support against said John L. Scherer, therefore, for the purpose of providing a support for said Anna Scherer to an extent by com-

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promise agreed on, and for the further purpose of determining the compensation to be paid said Anna Scherer by way of alimony in the event of divorce proceedings, one against the other, it is agreed: (1) That said John L. Scherer shall pay to said Anna Scherer, for her maintenance and support, \$10 per month, commencing this day, and payable at the office of Downey & Shutts, in Aurora, Indiana. (2) That if, after the expiration of two years from said 30th day of July, 1896, either party shall prosecute to final judgment an action for divorce against the other, the amount of alimony to be adjudged in favor of said Anna Scherer shall be \$400, on which shall be credited the aggregate amount theretofore paid in such monthly instalments. (3) That if said John L. Scherer, after the expiration of said two years, shall successfully prosecute his action for divorce against said Anna Scherer, he shall be further entitled to credit on said judgment for alimony, in a sum equal to the necessary costs of said action, not exceeding \$15, and not including his attorney's fees."

It is not shown by the complaint nor the contract that this separation was occasioned by any reason justified by the law. It is not necessary to cite authorities to the effect that the law favors marriage, and does not sanction contracts intended to effect its dissolution. It appears that the parties were living apart. It appears also that divorce proceedings were in contemplation. The amount of alimony which the wife was willing to accept was agreed upon, from which was to be deducted the amount theretofore paid in monthly instalments, under the agreement, together with the costs of the suit to a stated amount, in the event of a successful prosecution of a suit for divorce. Beach on Mod. Law of Cont., at §1256, says: "If a wife is living apart from her husband, with his consent, or for a justifiable cause, he is liable for necessities furnished her, whether by an individual on her application or by a city or town under the laws for the relief of paupers. In an action against a husband for necessities

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furnished his wife while she was living apart from him, the burden is on the plaintiff to show that her absence was such as to give her a right to use her husband's credit." *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *City of New Bedford v. Chace*, 5 Gray (Mass.) 28; *Inhabitants of Monson v. Williams*, 6 Gray (Mass.) 416; *Inhabitants of Brookfield v. Allen*, 6 Allen (Mass.) 585.

The contract recites that the parties were living apart "by reason of the abandonment one of the other." If this language is construed to mean that the parties had separated by mutual consent, and certainly it will bear no construction more favorable to appellee than that she voluntarily separated from her husband, it fails to show that the wife left her husband for reasons justified by law. In the absence of such showing, she would have no claim against him for support, and any contract to furnish such support would be without consideration. Having separated from him, she can have no claim upon his support unless that separation was justified by some reason recognized by our law. No such reason appears. The dissolution of the marriage contract is not to be left to the caprice of the parties. Our statute provides causes for absolute divorce. It makes no provision for separation *a mensa et thoro*. Had appellee a cause for divorce, she was entitled to a judicial determination of her rights and to alimony. It is the policy of the law that those sustaining to one another the relation of husband and wife should live together. Contracts for separation and separate maintenance are approved by English decisions, which have been followed by a number of American cases, but in them provision is made through trustees. We are not advised of any cases in our country where an executory contract entered into by husband and wife without the intervention of a trustee has been enforced by the courts. That many contracts of this character have been carried out is well known, but they "are not favorites of the law," is well known. *Kedey v. Petty*, 153 Ind. 179.

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Reed v. Beazley, 1 Blackf. 96, is strongly relied upon by appellee. In that case the suit was upon a note executed to a trustee, the consideration of which was shown by certain articles of agreement executed by Reed of the first part, his wife of the second part, and Beazley, trustee, of the third part, providing for the support of his wife. The husband covenanted for his own security and provided that in case he should be compelled to pay any of the debts of his wife he should retain the amount thereof out of the money he had covenanted to pay. The cause of the separation does not appear from the opinion, but we quote from it the following: "A disposition to separate man and wife or to facilitate a separation is nowhere manifested by the law or countenanced in the British books. But when unhappy differences arise and a separation is unavoidable, the law interposes to enable the parties to ameliorate the effects of the separation," from which we may infer that the cause of the separation was one at that time a ground for divorce. No other case in our reports has gone so far; it has not been cited in any of our decisions, but even in that case provision was made through a trustee.

The judgment is reversed, with instruction to the trial court to sustain the demurrer to the complaint.

HERNLEY v. BRANNUM ET AL.

[No. 3,911. Filed November 29, 1899.]

CONTRACTS.—Guaranty.—Complaint.—Plaintiff was the holder of a note executed by P. for the sum of \$1,528.81, with a balance remaining due of about \$1,000, secured by mortgage on certain described real estate. Defendants guaranteed the payment of a certain note executed by P. for the sum of \$1,000, payable to the order of plaintiff, in consideration that plaintiff release from a mortgage certain lots. *Held*, that the complaint was sufficient without asking for a reformation of the contract. *pp. 389-392.*

GUARANTY.—Bills and Notes.—Complaint.—In an action on a written undertaking guaranteeing the payment of a note, an allegation that

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"defendants have failed and refused to keep and comply with their part of said contract and to pay to said plaintiff said sum of \$1,000, and that said sum is now due, it being due on said note, and remaining wholly unpaid," is a sufficient averment that the note guaranteed is unpaid to the amount of \$1,000. *p. 392.*

GUARANTY.—Bills and Notes.—Complaint.—A complaint on a contract in the words "we, the undersigned, * * do hereby guarantee that a certain note, made and executed by P., for the sum of \$1,000, payable to the order of H., on the 14th day of February, 1894, will be paid," is sufficient without averring diligence to enforce collection from the maker. *pp. 392-395.*

From the Madison Superior Court. *Reversed.*

F. A. Walker and *F. P. Foster*, for appellant.

W. A. Kittinger, *E. D. Reardon*, *W. S. Diven*, *M. A. Chipman*, *S. M. Keltner* and *E. E. Hendee*, for appellees.

COMSTOCK, J.—The complaint in this cause is in two paragraphs. The first alleges that on the 14th day of February, 1893, one Frank K. Pierce executed to appellant his two promissory notes, each for the sum of \$1,523.81, due in one and two years respectively from date, with six per cent. interest from date, and with attorney's fees, payable without relief from valuation and appraisement laws. It further avers that on said date said Pierce executed to appellant and others a mortgage on certain real estate in Madison county, Indiana, describing the real estate; said mortgage having been executed to secure the payment of other notes besides the note of appellant herein, and said mortgage also being made to other mortgagees, being for the unpaid balance of the purchase money for said real estate described in the complaint. It further avers that afterwards, on the 16th day of November, 1893, the appellees by their certain written agreement, a copy of which is filed with said paragraph and made a part thereof, undertook and agreed to pay to appellant the sum of \$1,000 on said note first becoming due, it being the one falling due on the 14th of February, 1894; that at the time of the execution of said contract, there was remaining unpaid on said note about \$1,000, payments hav-

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ing been made upon the same, and the exact amount being due was then unknown to the parties to said contract; and said note was described in said contract as a note for \$1,000 payable to the order of appellant on the 14th of February, 1894. That said note of \$1,523.81 was the only note executed to appellant by Frank K. Pierce due and payable on said date, and that said defendants under and by the aforesaid contract undertook and agreed to pay to said plaintiff the sum of \$1,000 of said note; that in accordance with said contract entered into as aforesaid, she, with her husband joining therein, signed a release for forty lots included in the mortgage, it being the real estate described in said contract, and being the lots that were donated by the citizens for the purpose of raising the bonus to secure the Kelly Axe Manufacturing Works; and that she fulfilled and faithfully performed her part of the contract entered into as aforesaid. It is further averred that defendants failed and refused to keep their part of said contract and to pay to said plaintiff the said sum of \$1,000 on the 14th of February, 1894; and that said sum is now due, it being due on said date, and remaining wholly unpaid.

The only difference, except as to the averment of nonpayment of the note, between the first and second paragraph is that while the first paragraph alleges that appellees "undertook and agreed to pay to the plaintiff the sum of \$1,000 of said note," the second paragraph alleges that they "undertook and agreed to pay to this plaintiff the balance, or that part of said note then remaining unpaid." The agreement referred to and made a part of each paragraph, and dated on the 16th of November, 1893, and signed by appellees, is in the following language: "We, the undersigned citizens of Alexandria, Indiana, do hereby guarantee that a certain note made and executed by Frank K. Pierce of said city, for the sum of One Thousand Dollars (\$1,000), payable to the order of Mary C. Hernley, on the 14th day of February, 1894, will be paid. In consideration of the afore-

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said guarantee, the said Mary C. Hernley agrees to sign the release for forty lots situate in the southeast quarter section twelve, said lots being those that were donated to the citizens for the purpose of raising the bonus to secure the Kelly Axe Manufacturing Works, said release being in the hands of Hon. A. E. Harlan of this city."

The court sustained the separate demurrers for want of fact of each of the appellees to each paragraph of the complaint, and, appellant refusing to plead further, judgment was rendered against her for costs. The action of the trial court in its rulings upon the demurrers is the only question presented by this appeal. Appellees insist that the contract sued on is one in which the obligors are bound by the strict letter of the contract, and that the complaint is defective in the absence of any averment of mutual mistake or of fraud and a prayer for the reformation of the contract; that they are only bound, whether the contract is one of strict guaranty or an original promise, as to a note for \$1,000 payable to appellant on the 14th of February, 1894, and no other and different note. We do not lose sight of the rule that the sureties and guarantors have the right to stand upon the strict terms of their obligations, but there should be no forced construction either to release or to hold them. The contract of a surety or a guarantor is to be construed like any other contract, that is, according to the intention of the parties. *Jenkins v. Phillips*, 18 Ind. App. 562; *Russell v. Merrifield*, 131 Ind. 148; *Dodd v. Mitchell*, 77 Ind. 388. The intention of the parties is to be ascertained from the instrument read in the light of the surrounding circumstances. Upon the subject of letters of guaranty, Mr. Justice Story, in *Lawrence v. McCalmont*, 2 How. 425, speaking for the court said: "We have no difficulty whatsoever in saying, that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean, that the words should be forced out of their natural meaning; but simply that the words should receive

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a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied." To quote from *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 621: "What is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety?" Referring to the complaint, Pierce owed appellant a note for \$1,523.81, due February 14, 1894; he had not executed to her a note for any other amount; on that note there remained due, by reason of payments, about \$1,000. It will not be presumed that the execution of the contract was intended to be without meaning, or that it had reference to a note not in existence. They manifestly, as was understood by appellant, intended to secure to her the payment of the note due at the date named to the amount of \$1,000.

It is said in *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279, at page 12, upon the description of a debt guaranteed: "It is not essential that the debt should be described with minute particularity." In view of the averments it was not necessary that the complaint should ask for a reformation of the contract.

It is claimed that the first paragraph is defective for the further reason that it nowhere avers that the note of Pierce was not paid. The only averment upon the subject is in the following language: "She further avers that the defendants have failed and refused to keep and comply with their part of said contract and to pay to said plaintiff said sum of \$1,000 on the 14th day of February, 1894; and that said sum is now due, it being due on said note, and remaining wholly unpaid." This is an averment that the note guaranteed is unpaid to the amount of \$1,000. The objection is not well taken.

Appellees argue that the contract in suit is a strict guaranty; that they guaranteed that Frank K. Pierce would pay the note, and that the complaint is therefore defective because it does not aver diligence to enforce the collection

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from the maker. Appellant insists that it is an original undertaking. The text books and reports point out the distinction between the liability assumed by an original undertaking and a strict guaranty. The following quotation from *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686, in which Coffey, J., speaking for the court, on page 470 says: "It is often a question of very great difficulty to determine whether a particular instrument of writing constitutes a strict guaranty, or whether it constitutes an original undertaking. In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or in the event he fails, that the guarantor will pay such damages as may result from such failure. It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise. So that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the latter class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of the principal."

In Brandt on Suretyship and Guaranty (2nd ed.), §102, it is stated that: "When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed there is a breach of the guaranty, and no steps need be taken against the principal, nor need his insolvency be shown in order to charge the guarantor."

Baylies on Sureties and Guarantors, page 17, thus states the rule: "A guaranty of payment of a note is an absolute, unconditional undertaking on the part of the guarantor that the maker will pay the note when due, or that the

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guarantor will pay the debt at maturity if the maker does not; and the contract of the guarantor is broken upon the failure of the maker to meet his obligation." Citing, *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365.

The language of the instrument in suit is that the note in question will be paid. The complaint does not describe it as commercial paper. If the rule, as stated by Baylies, adds the words "at maturity" to the contract under consideration, making it read "will be paid at maturity," the time in which the note is to be paid is thus fixed, and it would be immaterial whether the contract is an original undertaking or of strict guaranty, for in neither case is it required to aver due diligence in the prosecution of the demand against the maker of the note or that he is insolvent or unable to pay. Apart from the view just stated, we are of the opinion that the complaint is sufficient without an averment of diligence.

In *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, Mitchell, J., speaking for the court, on page 312 said: "Where, however, the guaranty is for the fulfilment of a contract already made, or for one executed contemporaneously with the contract of guaranty, or for the payment of an existing debt, or where the contract of guaranty is upon a consideration distinct from the credit extended to the principal debtor, and which moves directly between the guarantor and guarantee, notice of acceptance is unnecessary. In such cases the acceptance of the guaranty, and the performance of the consideration upon which it rests, are all that are essential to make the contract complete and enforceable. *Davis v. Wells*, 104 U. S. 159; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Kline v. Raymond*, 70 Ind. 271; *Cooke v. Orne*, 37 Ill. 186." While holding a part of the contract a "strict guaranty," the court uses this language: "Usually the contract of the guarantor is to answer for the default of his principal if by the use of diligence loss results from such default, while the surety is responsible at once upon his

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direct engagement to pay." But the court holds that the failure to give notice and the resulting damages were, however, matters of defense, saying, at page 315: "In order to make it appear that they have been injured, they must aver and prove that their principal was solvent at the time of or since the default, and that he has since become insolvent or a nonresident, without property subject to execution within the State."

The contract before us was made for an existing debt; it was upon a consideration distinct from the credit extended to the principal debtor and which moved directly between the guarantor and guarantee. The consideration was performed on the part of appellant by the release of the lots; the note not having been paid, and appellees not having performed their engagement. Each paragraph is sufficient to withstand a demurrer. The judgment is reversed, with instruction to the trial court to overrule the demurrers to the first and second paragraphs of complaint.

**LAKE ERIE AND WESTERN RAILWAY COMPANY v.
MIKESELL.**

[No. 2,916. Filed November 29, 1899.]

PLEADING.—Recitals.—Conclusions.—Railroads.—A complaint against a railroad company charging that defendant, while wrongfully and unlawfully engaged in running a train of cars within the corporate limits of the city at a faster rate of speed than four miles an hour, contrary to and in violation of an ordinance of such city, struck and killed decedent, cannot be said to aver as facts that there was in force at the time an ordinance limiting the speed of trains to four miles an hour, and that the particular train was running beyond the ordinance rate. *pp. 396, 397.*

NEGLIGENCE.—Proximate Cause.—Negligence Per Se.—It does not necessarily follow from the fact that an injury happened at a time when defendant was violating a city ordinance, constituting negligence *per se*, that the injury occurred because of the violation, nor does such fact dispense with the requirement imposed upon plaintiff to show that such negligence was the proximate cause of the injury sued for. *pp. 397, 398.*

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From the Montgomery Circuit Court. *Reversed.*

J. B. Cockrum, C. G. Guenther, A. B. Clark, B. Crane, and A. B. Anderson, for appellant.

W. H. Johnston, C. Johnston, O. E. Brumbaugh and J. Combs, for appellee.

ROBINSON, J.—A demurrer to each of the three paragraphs of amended complaint was overruled in the Clinton Circuit Court, after which the venue was changed to the Montgomery Circuit Court.

The third paragraph, which alone is questioned in argument, avers that appellee is the father of Eunice Mikesell, an infant daughter now deceased, who, prior to November 3, 1897, was a member of his family and lived with him as such; that appellant's road runs through the city of Frankfort on a public highway known as Ohio street; "That on the third day of November, 1897, the said Eunice Mikesell was walking homeward from school on a public highway of said city known as O'Neil street, which crosses said railroad, and when she was in the act of crossing said railroad at the point where it crosses O'Neil street, the defendant, by itself, its agents, servants and employes, while wrongfully and unlawfully engaged in running its certain railroad train consisting of a locomotive engine, tender, and cars, over and upon its railroad within the corporate limits of the city of Frankfort, county of Clinton, and State of Indiana, at a faster rate of speed than four miles an hour, contrary to and in violation of sections one and two of an ordinance of the city of Frankfort, passed and ordained by the common council of said city on the 27th day of November, 1889, in a rude, violent and reckless manner, ran its said railroad train against, over and upon said decedent, and then and there and thereby while being so engaged in the commission of said wrongful and unlawful act, in a rude, violent and reckless manner struck, injured, bruised, wounded and killed said Eunice Mikesell, now deceased, without any fault or

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negligence on her part, and without any fault or negligence on the part of her father, the plaintiff herein." Facts are further averred showing appellee's damages.

It is a well established rule of pleading, both at common law and under the code, that facts must be stated by direct averment, and not given by way of recital. A complainant must aver, and not merely recite, that which is introductory to an averment. Facts can not be gathered by mere conjecture from an ambiguous or doubtful pleading. A pleader's conclusion may or may not be drawn from material facts. If the material facts are stated, the pleader's conclusion is harmless, but without the material facts his conclusion is fruitless.

In this paragraph the pleader sought to establish the company's negligence by showing it had omitted a certain duty; that by showing this omission of duty negligence would arise as matter of law. The complaint does not aver that there was in force at the time an ordinance limiting the speed of trains to four miles an hour. By way of recital it is said the train was running faster than four miles an hour, in violation of an ordinance passed some eight years before this accident happened. It can not be said that the complaint avers as facts that there was in force at the time an ordinance and that it limited the speed of trains to four miles an hour, and that the particular train was running beyond the ordinance rate. These facts can only be gathered by inference and conjecture, in violation of a long settled rule of pleading. *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Brickey v. Irwin*, 122 Ind. 51; *Chicago, etc., R. Co. v. Lee*, 17 Ind. App. 215; *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638.

Had the fact of the ordinance been averred together with the rate at which the train was running, a court could have said, as matter of law, whether or not the company was at the time violating the ordinance. This conclusion has

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been pleaded, but as it is not a statement of facts it can not aid the complaint. *Singer, etc., Co. v. Effinger*, 79 Ind. 264; *Kleyla v. Haskett*, 112 Ind. 515.

The fact that a certain omitted duty constituted negligence *per se* does not dispense with the requirement imposed upon the complaining party to show that this imputed negligence was a proximate cause of the injury sued for. Is it shown that the injury would not have occurred just as it did occur had there been no violation of the ordinance as attempted to be charged? There are no facts averred which affirmatively show that the accident was due to the negligence of appellant in failing to run its train within the rate of speed fixed by the ordinance. *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524. See *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647. Because the injury happened at a time when appellant was violating an ordinance it does not necessarily follow that the injury occurred because of the violation.

We cannot agree with appellee's counsel that the statements concerning the city ordinance and its violation may be treated as surplusage and the complaint still be held good. The theory of the complaint is that the company was negligent in running its train in violation of an ordinance. It is averred that the company "while wrongfully and unlawfully engaged" in running its train faster than four miles an hour, contrary to an ordinance of the city, etc. Even eliminating from the pleading all statements concerning the ordinance and its violation, there is nothing left to show the company's negligence. Not only is it apparent that the theory of the pleading is omission to observe the ordinance, but the record shows that theory was carried out at the trial, and the jury was instructed, at appellee's request, upon the question of the ordinance.

The demurrer to the third paragraph of complaint should have been sustained. Judgment reversed.

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BORMAN v. THE JUNG BREWING COMPANY ET AL.

[No. 2,918. Filed November 29, 1899.]

BONDS.—Capias ad Respondendum.—Failure of Plaintiff to Sign Bond.—Action on Bond.—The failure of the plaintiff to sign a bond in a proceeding in *capias ad respondendum* is not a defect of "form or substance or recital or condition," as contemplated by §1285 Burns 1894, and an action cannot be maintained on the bond by the defendant in such proceeding against the plaintiff.

From the Marion Circuit Court. *Affirmed.*

V. G. Clifford, W. F. Browder and W. S. Moffett, for appellant.

W. T. Brown and O. B. Iles, for appellees.

ROBINSON, J.—The Jung Brewing Company sued appellant before a justice of the peace; a *capias ad respondendum* was issued upon the filing of an affidavit by Jacob Reuter and a bond signed by Reuter alone; upon this writ appellant was arrested, and being unable to give bond for his appearance was confined in jail for a number of hours. At the trial before the justice appellant had judgment. He now sues the Jung Brewing Company and Jacob Reuter on the bond given before the justice for damages resulting to him through the proceedings before the justice. The complaint is in two paragraphs and with each the bond, which is signed by Reuter alone, is filed as an exhibit. The company's demurrer to each paragraph for want of facts was sustained, and this ruling is the only question presented.

The first paragraph is clearly bad because it neither shows by its averments nor the exhibit that the Brewing Company signed the bond, personally, by agent, or otherwise; but the paragraph and exhibit show that it was signed by Reuter alone.

The second paragraph contains an averment that the "bond was not signed by the principal through the oversight of the official taking the same." Section 1 of the act

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of March 4, 1897 (Acts 1897, p. 141), provides: "And such plaintiff shall also execute a written undertaking, with sufficient freehold surety, to be approved by the justice, payable to the defendant, conditioned that the plaintiff will duly prosecute this proceeding in *capias ad respondendum* to effect, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive."

But this paragraph fails to show that the bond was executed by the company, or by any one for it. It was never the company's bond. This is not a defect of "form or substance or recital or condition" as contemplated by §1235 Burns 1894. There is no bond of the company which could have any such defects. *Supreme Council, etc., v. Boyle*, 15 Ind. App. 342. It is true it is said in *Shroyer v. Simons*, 14 Ind. App. 631, that in an action on a defective bond the plaintiff may suggest the defect in the complaint, and recover to the same extent as if such bond were perfect in all respects. But this was said with reference to a bond which omitted the name of one of the obligees.

The case of *Supreme Council v. Boyle, supra*, was an action upon an appeal bond. It was there held that the bond was complete without the execution by the supreme council, and that in a suit on the bond, the council, not having signed it, could not be held liable thereon. That case holds that an appeal bond may be complete without having been signed by the judgment defendant, but there is nothing in the opinion authorizing us to say that a party may be held liable on a bond which he did not execute. The question in the case at bar is not the sufficiency of the bond as filed, nor is it the liability of a party for damages resulting from the wrongful issuing of a *capias*; but the suit is on the bond. We know of no authority authorizing us to hold a party liable on a bond which he never executed.

In *Ward v. Buell*, 18 Ind. 104, 81 Am. Dec. 349, the defects were failure to specify any amount or penalty. In

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Jones v. Druneberger, 23 Ind. 74, the operation of the bond was held to cover rents and profits though not mentioned in it. In *Railsback v. Greve*, 58 Ind. 72, suit was brought on a bond signed by only one of two judgment defendants, and the alleged defect in the bond was its failure to describe correctly the judgment appealed from. In *Hawes v. Pritchard*, 71 Ind. 166, a party acknowledged himself replevin bail for stay of execution for 180 days where the statute fixed the time in such cases at 150 days. In *Yeakle v. Winters*, 60 Ind. 554, the particular defect in the bond is not disclosed, but it is clear from the language of the opinion that it was not one that went to the execution of the bond. In *Opp v. Ten Eyck*, 99 Ind. 345, an appeal bond was held to include the mesne rents though not named in the bond. In *State v. Soudriette*, 105 Ind. 306, a recognizance in a case of felony taken by a mayor made payable to the city instead of the State was held good. In *Boden v. Dill*, 58 Ind. 273, the defect consisted in omitting from the body of the bond the name of one of the obligees.

In none of the above cases, which are cited by appellant's counsel, was the question presented in the case at bar involved. The bond itself shows appellee never signed it, and the complaint does not show it was executed by appellee or by any one having the power so to do. The demurrers were properly sustained. Judgment affirmed.

CITY OF BEDFORD v. WOODY.

[No. 2,923. Filed November 29, 1899.]

EVIDENCE.—Medical Services.—Action by Husband for Personal Injury of Wife.—In the trial of, an action for damages on account of personal injuries to plaintiff's wife, the court erred in admitting the testimony of a physician as to the amount of his bill for treating her for such injury, without showing the reasonable value of such services.

From the Lawrence Circuit Court. *Reversed.*

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T. J. Brooks and W. F. Brooks, for appellant.

J. E. Boruff, J. H. Underwood, C. C. Matson and J. Giles, for appellee.

BLACK, J.—The appellee sued to recover damages for losses suffered by him through a personal injury to his wife caused by her falling upon a defective sidewalk. A demurrer to the complaint for want of sufficient facts was overruled. It is suggested in argument, that though the complaint contains an averment that the person injured was without fault, yet the facts stated show her negligence, it being claimed in argument on behalf of the appellant that the complaint shows the sidewalk to have been so defective that the appellee's wife must be regarded as having knowledge of the danger, and the use thereof by her must be held to have been negligence on her part.

The complaint showed that the sidewalk, made of boards laid upon wooden stringers and nailed thereto, was in a very bad condition, the defects (such as might result from decay and want of repair) being particularly stated; and it is alleged that the appellee's wife was walking upon the sidewalk, without any fault on her part, "and without any knowledge of the dangerous, deadly, worn, unsafe, unnailed, rotten, unstable, and rickety condition of said walk and stringers, and while using all precautions and care, and doing everything possible to learn and know the condition of said walk, and while looking and examining the same with her eyes, one or more of the boards of the walk suddenly, and without any intimation or warning, gave way and went down at one end, making a hole in said walk into which her foot and leg went down, and at the same time the other ends of said boards went up striking and catching her," etc. After relating her injuries, it was averred that they were caused by the carelessness and negligence of the appellant, and without any fault or knowledge on her part.

It seems sufficiently evident from this recital that the objection urged against the complaint can not be sustained.

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On the trial by jury of the issue formed by a denial of the complaint, a physician who rendered service as such in the treatment of the appellee's wife for the injury involved in the action, while testifying as a witness for the appellee, was asked on his behalf by his attorney how many visits the witness made to see the appellee's wife and the value of those visits. To this question counsel for the appellant objected, stating a number of alleged reasons for the objection. Without ruling upon the objection, the court asked the witness the following question: "If the doctor is able to state the amount of the indebtedness of Charley Woody to him on account of medical service and attention rendered his wife prior to the time of the commencement of this suit, he may so state; you may state from your own recollection, if you can." The appellant interposed an objection to this question propounded by the court, stating a number of assumed grounds of objection, among them, "that it is not a proper measure of value of services, nor the proper method of proving the value of services, and because the value of services has not been proved." This objection having been overruled, the witness answered, "One hundred and sixty-five dollars and seventy cents."

If the appellee was entitled to recover, one element of his damages would be the necessary and reasonable expenses incurred by him for medical treatment of his wife for the injury suffered by her through the appellant's wrong. The question is presented as to whether the method of proof adopted by the trial court was allowable. It appeared in evidence that the appellee had paid this physician on account of these services the sum of \$9, and that the remainder of his bill was unpaid. The reasonable value of his services was not shown by the other evidence. In such a case, if the physician's bill has not been paid, the plaintiff can recover therefor only upon evidence of the reasonable value of the physician's services. *Gulf, etc., R. Co. v. Campbell*, 76 Texas 174, 41 Am. & Eng. R. Cas. 100; *McNaier v. Manhattan*

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R. Co., 22 N. Y. St. 840, 4 N. Y. Supp. 310, affirmed by the Court of Appeals in 123 N. Y. 664, 26 N. E. 750.

In *Gulf, etc., R. Co. v. Harriett*, 80 Texas 73, 15 S. W. 556, it was held that the medical bills in themselves were not evidence, but there was no error in admitting them, the plaintiff being required to prove the facts and to show that they were reasonable by other testimony.

In *Morsemann v. Manhattan R. Co.*, 10 N. Y. Supp. 105, an action for personal injuries, it was held not error to admit evidence of the amount of the physicians' bills which the plaintiff had paid, without proof of the value of the services; and the case was distinguished from *Gumb v. Street R. Co.*, 114 N. Y. 411, 21 N. E. 993, 43 Am. & Eng. R. Cas., 315, where it was held error to receive evidence of the physician's charge without evidence of payment or of value, other than the remark of the physician, who testified, "Seventy-five dollars is the amount of my bill now; that is very small too." So, in *Colwell v. Manhattan R. Co.*, 10 N. Y. Supp. 636, where the evidence showed that the plaintiff had employed a nurse to whom the plaintiff paid a certain sum, it was said that the price actually paid for the service might be considered as some evidence of value of the work performed, and constituted competent proof sufficient to warrant the jury in considering the item in the assessment of damages.

In *City of Indianapolis v. Gaston*, 58 Ind. 224, a case like the one at bar, it was said that whenever it is proper in such a case to prove the services of a physician or surgeon, the fair value of such services is the legal scale.

In *Summers v. Tarney*, 123 Ind. 560, it was said that the presumption must be, until the contrary appears, that the amount paid out for surgical treatment was a reasonable and proper amount, that the question is as to the value of the services to the plaintiff, with the distinction that if the surgeon donates the services the real value is the measure, but if not, then it is what the plaintiff necessarily becomes liable to pay.

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In *Brosnan v. Sweetzer*, 127 Ind. 1, an action for personal injury, it was held that "one element of damages is the reasonable value of properly nursing and caring for the injured person;" and it was said that the plaintiff's contract or liability had nothing to do with the liability of the defendants; that if they were liable for damages on account of the injuries, they were liable "for the reasonable value of the necessary services of a nurse, the same as the services of a physician or surgeon." See, also, *Pennsylvania Co v. Marion*, 104 Ind. 239.

The judgment is reversed, and the cause is remanded for a new trial.

WEEK ET AL. v. WIDGEON.

[No. 2,939. Filed November 29, 1899.]

APPEAL AND ERROR.—Instructions.—Record.—In order that instructions may be made a part of the record without a bill of exceptions the record must affirmatively show that they were filed. pp. 406, 407.

SAME.—Instructions.—When Evidence is Not in Record.—A cause will not be reversed on the instructions when the evidence is not in the record, unless the instructions are incorrect and injurious under any supposable evidence admissible under the issues on trial. p. 407.

SAME.—Instructions.—When Not All in Record.—Where it does not appear from the record that certain instructions complained of were all the instructions given, the judgment will not be reversed because of the instructions complained of, unless they are so radically wrong as to be incurable by other instructions. p. 407.

SAME.—Instructions.—Joint Assignment.—A joint assignment in a motion for a new trial of the giving of two instructions is not available if either of the instructions is not erroneous. p. 408.

STATUTE OF FRAUDS.—Promise to Answer for Debt of Another.—Where plaintiff procured a person to perform services for defendants on the promise of defendants that they would pay such person his salary and would pay plaintiff whatever sum he might pay or become liable to pay to such third person for board or livery hire while in the service of defendants, such agreement was not a promise to answer for the debt, default, or miscarriage of another within the meaning of the second clause of the statute of frauds. pp. 408, 409.

From the Wells Circuit Court. *Affirmed.*

Week v. Widgeon.

A. L. Sharpe and C. E. Sturgis, for appellants.

A. N. Martin and W. H. Eichhorn, for appellee.

BLACK, J.—This was an action upon account commenced before a justice of the peace. Counsel for the appellants contend that the amount of the recovery against them was too large; but the evidence is not in the record, the bill of exceptions containing it having been presented to the judge long after the expiration of the period, extending beyond the term, given for the filing thereof.

It is also contended that the court erred in giving two instructions numbered six and eight, and in giving, as modified by the court, a certain instruction, numbered two, asked by the appellants. The transcript contains a number of instructions purporting to have been asked, some by the plaintiff, and some by the defendants, and there are others to which the name of the judge is signed.

There is a bill of exceptions showing the giving of instructions numbered six and eight and exceptions thereto, and the request of the appellants for the giving of instruction numbered two, its modification, and the giving of the modified instruction, and exception thereto.

It is suggested by counsel for the appellee that those instructions given or refused, which are not thus embraced in the bill of exceptions, are not to be regarded as part of the record, for the reason that it does not appear that they were filed as required by the statute, §542 Burns 1894, §533 Horner 1897. This claim of counsel must be sustained.

It is well settled, by way of applying the express provision of the statute, that, in order that instructions may be made part of the record without a bill of exceptions, the record must affirmatively show that they were filed. *Ft. Wayne, etc., R. Co. v. Beyerle*, 110 Ind. 100, and cases cited therein; *Fromlet v. Poor*, 3 Ind. App. 425; *Killion v. Hulen*, 8 Ind. App. 494; *Stephenson v. Elliott*, 11 Ind. App. 694; *Krom v. Vermillion*, 143 Ind. 75; *Landwerlen v.*

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Wheeler, 106 Ind. 523; *Blount v. Rick*, 107 Ind. 238; *Childress v. Callender*, 108 Ind. 394. Though instructions be inserted in the transcript of the record by the clerk, if there be nothing to show that they were filed they will not be regarded as part of the record. *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378; *Olds v. Deckman*, 98 Ind. 162.

The requirement of filing applies to instructions asked and refused as well as to those given by the court, either of its own motion or upon request. See *Harlan v. Brown*, 4 Ind. App. 319. As to the instructions embraced in the bill of exceptions, the evidence not being in the record, the giving of these instructions could not be available error unless they were incorrect and injurious under any supposable evidence admissible under the issues on trial. *Hilker v. Kelley*, 130 Ind. 356, 15 L. R. A. 622.

The bill of exceptions does not expressly show that these were all the instructions given, and if any inference might be indulged from the numbers of the instructions embraced in the bill, it would not be that they were all the instructions given. In *Lake Erie, etc., R. Co. v. Carson*, 4 Ind. App. 185, it was said that each particular instruction must be considered and construed in connection with all other instructions given, and that if an instruction given be absent from the record, and an instruction to which objection is made might, when taken in connection with other instructions, correct and applicable, be thereby so explained and qualified that the instructions considered together would correctly state the law of the case, the judgment will not be reversed because of such instruction to which objection is made. Where it does not appear from the record that certain instructions complained of were all the instructions given, the judgment will not be reversed because of the instructions complained of, unless they were so radically wrong as to be incurable by other instructions. *Cooper v. State*, 120 Ind. 377; *Marshall v. Lewark*, 117 Ind. 377; *Pence v. Waugh*, 135 Ind. 143; *Hannan v. State*, 149 Ind. 81; *Town of Ladoga v. Linn*, 9 Ind. App. 15.

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In the motion for a new trial the appellants assigned as a cause the giving of the sixth and eighth instructions jointly; therefore, if either of these instructions was not erroneous, this cause for a new trial could not be sustained. One of the items of the account sued on was for livery hire and hotel bill amounting to \$21.50. The eighth instruction was as follows: "If the evidence establishes to your satisfaction that the plaintiff, Widgeon, at the request of the defendants, Week and Hudson, procured one John M. George to perform services for the defendants, on the promise of Week and Hudson to plaintiff Widgeon that the defendants would pay to said George his salary, and that the defendants would also pay to the plaintiff whatever sum the plaintiff might legally pay, or become liable to pay, for the board of said George and the use of livery horses by said George while in the service of the defendants; and if the evidence further establishes to your satisfaction, that, pursuant to said contract between the plaintiff and the defendants, the plaintiff, Widgeon, actually paid or rendered himself legally liable to pay any third person for board or the use of livery for said George while performing services for the defendants, then the defendants would be liable in this action to the plaintiff for whatever sum the evidence shows that he paid or became legally liable to pay to such third person on account of such board and livery hire for said George; and this is true whether the evidence shows that the plaintiff has or has not paid the amount of such board and livery hire."

The objection urged against the instruction, as we understand the argument of counsel, is that the complaint as to this item of the account was upon an implied contract to pay a debt incurred by the plaintiff, and that the defendants could not be bound therefor except by a contract in writing signed by them, reference being made to the second clause of our statute of frauds, relating to the special promise of one to answer for the debt, default, or miscarriage of another. To

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come within the statute, the promise must be that the promisor will make good to the promisee something which a third person is bound to make good to the promisee. If, in substance, whatever the form, the promise be to perform the obligation of the promisor, it is not within the statute. The authorities to this effect are abundant. The promise referred to in the instruction was not one within the meaning of the statute, but was one to perform the obligation of the promisors, the appellants.

In the portion of the complaint in which this item was stated, it was said that the defendants were by an implied agreement to reimburse the plaintiff. The statement that the agreement was an implied one was the statement of a conclusion of law. The action was commenced before a justice of the peace, and a complaint which would apprise the defendants of the nature of the cause of action, and was so explicit that a judgment thereon would bar another action for the same cause, was sufficient. The complaint was upon an account embracing a number of items. The items of an account may set forth charges arising "out of contract express or implied, or from some duty implied by law." *Nelson v. Board, etc.*, 105 Ind. 287; *Watson v. Penn*, 108 Ind. 21. If the evidence showed an express promise on the part of the appellants to pay the amounts which the appellee laid out or for which he became legally liable in the performance of service for the appellants, we are of the opinion that there might be a recovery, under the complaint, for the hotel bill and livery hire, as stated in the instruction.

The question involved in the action of the court in modifying instruction numbered two asked by the appellants is sufficiently disposed of in what we have said in relation to instruction numbered eight.

Judgment affirmed.

WEST, TRUSTEE, v. GRAFF ET AL.

[No. 2,941. Filed November 29, 1899.]

EVIDENCE.—Agreed Statement of Facts.—Appeal and Error.—A statement of the evidence agreed upon by the parties will not be treated on appeal as a statement of facts in a special finding, but will be regarded as the evidence introduced upon the trial. *p. 413.*

REPLEVIN.—Possession.—In order to maintain an action in replevin it must be shown that defendant was in possession, actual or constructive, at the commencement of the action. *p. 413.*

SAME.—Judgment.—In an action in replevin the judgment may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention. *p. 413.*

SAME.—Demand.—Where property is obtained by a purchaser through fraud, the seller may rescind the sale and recover possession by an action in replevin without making any demand before the commencement of the action, where the property is in the possession of the purchaser or his trustee for the benefit of creditors. *pp. 413, 414.*

SAME.—Sales.—Fraud.—The fact that the purchaser of goods was insolvent when the goods were sold and delivered, and knew of his inability to pay all of his debts, and that he mortgaged the goods purchased, and others, constituting his stock of merchandise on hand, to a trustee to pay certain *bona fide* debts, giving greater preference to some creditors than others, will not alone warrant a conclusion that the purchase was fraudulent. *p. 415.*

FRAUD.—Preferring Creditors.—The preference of particular creditors by paying or securing their claims in full or in unequal ratio, is not in itself fraudulent or void, but is permissible, when not made in a general assignment under the statute. *pp. 415-417.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.—Special Assignment.—An assignment for the benefit of creditors, which names the particular creditors for whose benefit it is made, is not a general assignment, but is special as to the persons named. *pp. 417, 418.*

From the Gibson Circuit Court. *Reversed.*

L. C. Embree, for appellant.

John H. Miller and *M. L. Miller*, for appellees.

BLACK, J.—The appellees brought their action against the appellant to recover possession of a lot of shoes, the complaint (filed on the 2nd of March, 1895) being in the usual form in replevin. Without any order for the seizure of the

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goods, and without the filing of an answer, the cause was tried by the court, the finding being for the appellees, and that they were the owners of the property mentioned in the complaint, describing it, all being of the value of a sum stated, and that the appellant unlawfully detained the same from the appellees.

The appellant's motion for a new trial was overruled, and the question as to the sufficiency of the evidence is alone presented here.

On the trial, the parties agreed upon a statement of the evidence, in substance as follows: On the 15th of January, 1898, and for two years prior to that date, John Griffin and Elmer E. Sharp were partners engaged in the business of owning and operating a general store at Fort Branch, Gibson county, Indiana, and were insolvent, but were buying and selling goods in the regular course of business. At the date above mentioned, the appellees were, and they still continued to be, partners in the wholesale shoe business at Philadelphia, Pa. On that day, Griffin and Sharp ordered from the appellees the goods described in the complaint, and in response to this order the appellees on the 22nd of January, 1898, shipped said goods to said Griffin and Sharp, on the terms that the same should be paid for by the purchasers in sixty days thereafter in the sum of \$268.20. The goods were sold by the appellees to Griffin and Sharp on said terms, and at that time they were, and they still were, of the respective values alleged in the complaint. The goods arrived at Fort Branch, and were received into the store of Griffin and Sharp, on the 27th of January, 1898, and were then opened and placed in the stock of said Griffin and Sharp, and on sale in their said store, as a part of the general merchandise therein; but they remained in the original cases in which they had been shipped, the lids of the cases having been removed, and the cases having been placed one on another in tiers in the form of shelves, with the openings turned outward so as to expose the contents to view; and

some pairs of said shoes had been sold at retail by Griffin and Sharp before making the mortgage hereinafter mentioned; and said shoes as so placed in said stock were placed as said Griffin and Sharp intended them to remain until sold by them at retail.

On the 31st of January, 1898, Griffin and Sharp executed to the appellant their chattel mortgage, whereby they mortgaged to him, as trustee, their entire stock of goods, wares, and merchandise, including the goods described in the complaint; and the mortgage provided, among other things, that the appellant, as such trustee, should take immediate possession of the mortgaged property and forthwith sell the same for cash, and with the proceeds pay certain creditors of said firm; and in the mortgage certain of said creditors were named whose aggregate demands against said firm amounted to more than \$6,000, and said trustee was thereby directed to pay them in full before paying any other demands against said firm; and the mortgage stipulated that, after paying said creditors, then the residue of said proceeds should be paid *pro rata* on the demands of certain other creditors of said firm, among whom were named the appellees. Under and pursuant to this mortgage, the appellant, as such trustee, did, on the 31st of January, 1898, take full and absolute possession of said mortgaged property, and he proceeded forthwith to sell the same, as required by the mortgage.

Afterward, on the 10th of February, 1898, the appellees demanded of said trustee that the goods described in the complaint should be returned and delivered up to them, which said trustee refused to do. On the 28th of February, 1898, the appellant, as such trustee, had sold the whole of said mortgaged property, in accordance with the terms of the mortgage, and had delivered the whole thereof to the purchasers thereof, who had shipped and removed the whole of said goods from said store and away from Gibson county; and on the 1st of March, 1898, said purchasers paid the

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appellant, as such trustee, for said goods in full, and at no time after the 1st of March, 1898, did the appellant have any title to said goods or any part thereof, and no part of the goods were in his possession or in said county on that day or thereafter. It was further agreed by the parties that, prior to the making of said mortgage, three pairs of shoes described in the complaint, of the value of \$2 per pair, had been sold by said Griffin and Sharp, and they never came into the possession of the appellant.

This statement agreed upon by the parties is not to be treated, as counsel for the appellant argues it should be treated, as the statement of facts in a special verdict or in a special finding; but it is to be regarded as the evidence introduced upon the trial, and if, so regarded, it tends to sustain a finding in favor of the appellees, we can not weigh it and decide upon it the issue of fact submitted to the court below for trial without the intervention of a jury. The burden of proof was upon the appellees, and unless it can be said properly that the evidence tended to sustain the complaint in replevin, they were not entitled to recover.

It is a generally accepted and often stated doctrine that, to maintain replevin, the defendant must have been in possession, actual or constructive, at the commencement of the action. *Louthain v. Fitzer*, 78 Ind. 449; *Hadley v. Hadley*, 82 Ind. 75; *VanGorder v. Smith*, 99 Ind. 404; *Rose v. Cash*, 58 Ind. 278; *Penninsular Stove Co. v. Ellis*, 20 Ind. App. 491.

Our statute provides that the judgment for the plaintiff, in an action to recover the possession of personal property, may be for the delivery of the property, or the value thereof in case a delivery can not be had, and damages for the detention. §581 Burns 1894, §572 Horner 1897.

It is not always necessary to the success of the plaintiff that the property be so situated that the officer may be able to take it from the defendant and deliver it to the plaintiff.

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In *Helman v. Withers*, 3 Ind. App. 582, it was held that a person in possession of goods, without right, can not avoid the action of replevin by wrongfully transferring the possession to another, even though the transfer be made before the commencement of the suit. If it be assumed that Griffin and Sharp obtained the goods from the appellees through fraud, this would be regarded as a wrongful taking, and while the goods remained in the possession of the purchasers, or the appellant as trustee, the appellees might rescind the sale and recover the possession by the action of replevin, without making any demand before the commencement of the action. *Parrish v. Thurston*, 87 Ind. 437; *Tennessee, etc., Co. v. Sargent*, 2 Ind. App. 458; *Levi v. Kraminer*, 2 Ind. App. 594. See, also, *Goodman v. Sampliner*, ante, 72. If a demand that the goods sold be returned and delivered up to the sellers would render a sale made by the appellant after the demand such a wrongful disposal of the property as to uphold an action of replevin commenced against him, after he so parted with the possession, yet to authorize a finding for the appellees on such theory the evidence should show that the demand of the appellees was made while the defendant in replevin still had possession or control of the goods.

In the evidence submitted to the court below, it appears that the appellant took possession of the mortgaged property, which included the goods described in the complaint, on the 31st of January, 1898, and that he forthwith proceeded to sell the mortgaged property, and that on the 28th of February, 1898, he had sold the whole of the mortgaged property and had delivered it to the purchasers thereof, who had removed it from the county. It does not appear at what date between the 31st of January and the 28th of February he parted with the possession of the goods described in the complaint. The demand for the return of these goods described in the complaint was made on the 10th of February, 1898, at which date he may have disposed of them, so

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far as the evidence shows. Furthermore, we can not concede that the evidence was sufficient to authorize a finding of fraud in the purchase of the goods by Griffin and Sharp. They placed the goods in their stock of merchandise as they intended them to remain until sold by them at retail, and they had so sold a portion of them before the execution of the mortgage. They were insolvent, but the whole amount of their indebtedness, or the whole value of their assets, is not shown; and it does not appear that they made any representation whatever to the appellees, or that any inquiry was addressed to them or others by the appellees before they sold and delivered the goods upon the mere order for such goods.

The question of fraud is one of fact; and while it is not necessary that it be established by direct and positive evidence, but may be inferred from circumstances, yet it can not properly be inferred from the mere doing of what one has a legal right to do. The fact that the purchasers were insolvent when the goods were sold and delivered to them, apparently in the regular course of business, and the inference, if it can be properly drawn from the meager evidence, that they knew of their inability at that time to pay all their debts, together with the fact that they mortgaged these goods and others, all constituting their stock of merchandise on hand, as indicated by the evidence, to a trustee, to pay certain presumably *bona fide* debts, giving greater preference to some of their creditors than others, did not alone warrant a conclusion that the purchase of the goods described in the complaint was fraudulent. *Thompson v. Peck*, 115 Ind. 512; *Levi v. Bray*, 12 Ind. App. 9.

The preference of particular creditors by paying or securing their claims in full or in unequal ratio, not in an assignment of all the debtor's property for the benefit of all his creditors, is not in itself fraudulent or void, but is permissible. In the case of preference in a *bona fide* general assignment under the statute, the assignment will be upheld,

while the preference is annulled. *Henderson v. Pierce*, 108 Ind. 462; *Redpath v. Tutewiler*, 109 Ind. 248; *Schwab v. Lemon*, 111 Ind. 54; *Carnahan v. Schwab*, 127 Ind. 507; *Gilbert v. McCorkle*, 110 Ind. 215. If from the fact that the mortgage was executed so soon after the receipt of the goods mentioned in the complaint, together with the fact that the purchasers were insolvent when they bought the goods, without more, it could be inferred as a fact by the court trying the issue that the purchasers intended at the time of the making of the purchase not to pay for the goods, there is evidence that they intended, when the goods were placed in the store, to sell them there themselves at retail; so that the mere fact of the making of the mortgage soon afterward, together with the fact of insolvency, could not be taken to indicate that such disposition of the goods to favored creditors was purposed at the time of the sale and delivery of the goods, or that the buyers purchased them with the design not to pay for them. *Thompson v. Peck*, 115 Ind. 512, 518.

In *Lord v. Fisher*, 19 Ind. 7, it is said: "It is an honest disposition of a man's property to use it in paying or securing an honest debt. * * * It is not, in the eyes of the law, necessarily a dishonest use of a man's property to convey all he has to pay or secure one debt while he leaves many others unpaid, or unsecured." See *Cushman v. Gephart*, 97 Ind. 46, where it is said that when it is attempted to make a general assignment of all a debtor's property for the benefit of all his creditors, the statute on that subject "must be complied with, or the assignment, without regard to actual fraud, will be held fraudulent and void, but an assignment by a debtor for the benefit of a part of his creditors, in order to be held void, must be actually fraudulent." This language is quoted in *Grubbs v. Morris*, 103 Ind. 166, 168, where it is also said that, where there is only a partial transfer, as where a part only of the debtor's property is conveyed, or where only one creditor is preferred and there is no gen-

eral assignment, a conveyance to a trustee will be sustained, as not in contravention of the statute.

In *Henderson v. Pierce*, 108 Ind. 462, it is held that an insolvent debtor may prefer one or more of his creditors by securing them or by a sale of property to them, if such security be given or such sale be made in good faith; that he can not give such preference while proceeding under the statute relating to voluntary assignments for the benefit of creditors, but that if in so proceeding he has introduced into the deed of assignment requirements which, while not in conflict with some express provision of law, and not requiring that any such provisions of law be disregarded, are nevertheless constructively invalid, as a preference to one or more of the creditors, such assignment, if not actually fraudulent, will stand, while such constructively invalid provision will be nullified and controlled by operation of the statute governing voluntary assignments.

If the instrument designated as a mortgage in the statement of evidence were an assignment made by the insolvents for the purpose of executing a general assignment of all their property in trust, for the benefit of all their *bona fide* creditors, it would by the terms of the statute be fraudulent and void, because of its not being made as provided for in the statute. §2899 Burns 1894, §2662 Horner 1897. It does not appear from the evidence that the certain creditors who were to be paid ratably after certain others had been paid in full were all the creditors other than those who were to be paid in full; and it does not appear that all the assets of the partnership, all its property, rights, and credits, were mortgaged.

An assignment for the benefit of creditors which names the particular creditors for whose benefit it is made is not a general assignment, but is special as to the persons named. Bump on Fraud. Conv. (3rd ed.) 344-5, (4th ed. §320); *England v. Reynolds*, 38 Ala. 370.

Apart from the provisions of a bankrupt law, and except

so far as our statute relating to voluntary assignments for the benefit of creditors prevents, the debtor may, "in virtue of that absolute dominion which he holds over his estate, make a *bona fide* assignment for the payment of debts with stipulations in favor of preferred creditors. He may assign the whole of his property for the benefit of a single creditor in exclusion of all others, or he may distribute it in unequal proportions, either among a part or the whole of them." Bump on Fraud. Conv. (3rd ed.) 395, (4th ed. §373); *New Albany, etc., R. Co. v. Huff*, 19 Ind. 444; *Wynne v. Glidewell*, 17 Ind. 446; *Chandler v. Caldwell*, 17 Ind. 256; *Barker v. Hall*, 13 N. H. 298.

If the mortgage to the trustee should be regarded as ineffectual as against the appellees, or if the preferences therein made could not be sustained, the completed sale made by the appellees would not therefore be nullified, and their action to recover possession of the goods would not thereby be aided, the evidence tending to prove that the mortgaging of the goods was not in contemplation when the goods were delivered to the firm and the sale was completed, and there being no evidence of actual fraud in the sale.

Whatever view ought to be taken of the mortgage to the trustee, this action must be sustained, if at all, as an action at law, in replevin, and even if the goods were in the actual or constructive possession of the defendant at the commencement of the action, the plaintiffs' success would depend upon facts sufficient to set aside the sale apparently regular and *bona fide*. The judgment is reversed, and the cause is remanded for a new trial.

Robinson, J., took no part in this cause.

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RINEHART v. THE STATE EX REL. KEITH.

[No. 2,954. Filed November 29, 1899.]

APPEAL AND ERROR.—*Conflicting Evidence.*—The Appellate Court will not reverse a judgment on conflicting evidence. *p. 420.*

NEW TRIAL.—*Newly Discovered Evidence.*—A new trial will not be granted on account of newly discovered evidence, when such evidence is merely cumulative. *p. 420.*

SAME.—*Newly Discovered Evidence.—Diligence.*—A party asking for a new trial on the ground of newly discovered evidence must show facts from which the court can determine whether he has exercised due diligence. *pp. 420, 421.*

SAME.—*Newly Discovered Evidence.*—To warrant the granting of a new trial on account of newly discovered evidence, the evidence must be of such a character that it would likely change the result. *p. 421.*

APPEAL AND ERROR.—*Waiver.*—Assignments of error which are not discussed will be deemed waived. *p. 421.*

BASTARDS—*Character of Relatrix.—Instruction.*—Where in the trial of a bastardy proceeding there was evidence from which the jury might reasonably conclude that defendant was the father of the child, it was not error to instruct the jury that "it would make no difference how immoral the relatrix has been, or what acts of intercourse she has had with other men, as the purpose of this suit is to determine the paternity of such bastard child, and provide for its maintenance and education." *pp. 422, 423.*

INSTRUCTIONS.—*Refusal to Give.*—No error was committed in refusing an instruction when the substance of it had been given in another instruction. *pp. 423, 424.*

From the Madison Superior Court. *Affirmed.*

B. R. Call and *C. M. Greenlee*, for appellant.

Dean & Dean and *D. W. Scanlan*, for appellee.

WILEY, C. J.—This was an action to establish the paternity of the illegitimate child of the relatrix and to provide for its maintenance. The case was tried by a jury and resulted in a verdict finding that appellant was the father of the child. Appellant's motion for a new trial was overruled, and the court fixed the amount to be paid by appellant for the support of the child at \$500, and rendered judgment

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accordingly. The record also shows that appellant moved to modify the judgment, which motion was overruled. Overruling the motions for a new trial and to modify the judgment are assigned as error.

The second and third reasons assigned for a new trial are that the verdict is contrary to law, and that it is not sustained by sufficient evidence. Appellant has argued at some length that the evidence is not sufficient to support the verdict and judgment. We have read and carefully considered all the evidence, and we find that there is an abundance of evidence in the record upon which the jury were authorized to find that appellant was the father of the relatrix's child. In fact, we do not see how they could have reached a different conclusion. It is enough for us to say that there is much legitimate evidence in the record to support the verdict, and while there is some conflict as to the material fact at issue, yet we are not at liberty to weigh the evidence, and hence the judgment must stand unless the record presents some reversible error.

Appellant's fourth reason for a new trial was based upon newly discovered evidence and was supported by the affidavit of appellant, and one Bradley, as to what the evidence was. These affidavits stated that Bradley, one of the affiants, would testify, if a new trial should be granted, that he had sexual intercourse with the relatrix about the time when she testified she became pregnant by appellant. There are two reasons why the facts stated in the affidavits were insufficient to warrant the granting of a new trial; (1) the newly discovered evidence was merely cumulative, and (2) due diligence was not shown why the evidence was not sooner discovered. There was some evidence introduced which, if the jury believed, they could have found that at about the time the relatrix testified she became pregnant she had improper relations with other men. It is plain that the newly discovered evidence relied upon was purely cumulative, and that it has long been the rule in this jurisdiction, from which

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no variance has been made, that a new trial will not be granted for newly discovered evidence when such evidence is merely cumulative. *Hines v. Driver*, 100 Ind. 315; *Wall v. State, ex rel.*, 80 Ind. 146; *Baldwin v. Shill*, 3 Ind. App. 291; *Cincinnati, etc., R. Co. v. Lutes*, 112 Ind. 276. In his affidavit in support of his fourth reason for a new trial, appellant states that neither he nor his counsel knew, until after the trial, that Bradley would testify as stated, and that they could not have discovered such newly discovered evidence by the exercise of reasonable diligence. The affidavit is silent as to any affirmative act on the part of appellant looking toward the discovery of such evidence, and failing in this, the affidavit is insufficient. The law requires the exercise of reasonable diligence and watchful vigilance on the part of the litigants in the preparation for the trial of their cause, and courts will not grant them relief on account of their own laches. A party asking for a new trial on the ground of newly discovered evidence must show facts from which the court can determine whether he has exercised due diligence. *Hines v. Driver, supra*; *Wall v. State, ex rel., supra*. Another wholesome rule is that newly discovered evidence relied upon for a new trial should be so strong, clear, and convincing, that it would likely change the result, before a new trial should be granted for that reason. *Freeman v. Hutchinson*, 15 Ind. App. 639; *Morrison v. Carey*, 129 Ind. 277; *Thornburg v. Buck*, 13 Ind. App. 446; *Sullivan v. O'Connor*, 77 Ind. 149; *Richter v. Meyers*, 5 Ind. App. 33; *Simpson v. Wilson*, 6 Ind. 474; *Jackson v. Swope*, 134 Ind. 111.

By the fifth to the sixteenth reasons, inclusive, for a new trial, the giving and refusing to give certain instructions are questioned. Appellant has waived, by his failure to discuss them, all except the giving of the fifth instruction on the court's own motion, and the refusal to give instruction numbered two, tendered by the appellant. We will consider these in their order. Instruction number five, given by the

court, is as follows: "If you find from a preponderance of all the evidence that the relatrix Mettie M. Keith has been delivered of a bastard child, and that said child is now living, and that the defendant Jacob Rinehart is the father of such bastard child, it would make no difference how immoral the relatrix has been, or what acts of intercourse she has had with other men, as the purpose of this suit is to determine the paternity of such bastard child and provide for its maintenance and education." Appellant concedes that the instruction is technically correct, but that it is palpably wrong when considered in the light of the defense made. Counsel for appellant rested their defense upon the ground that the relatrix was a prostitute and had indiscriminately had sexual intercourse with men other than appellant at or about the time she says she became pregnant, and this being true, it was impossible for her to say who the father of her child was. If, as contended by appellant, relatrix did sustain such unlawful and immoral intercourse with other men that she could not tell with absolute certainty who was the father of her child, yet what she did say about it, together with all the facts and circumstances attending it, was competent for the jury to consider in arriving at the fact at issue. She testified that within a very short time after one of her menstrual periods, appellant had sexual intercourse with her several times, and that that was when she became pregnant. She testified that at or about that time she did not have such relations with any other man. It was shown by the evidence of a physician that a woman was more apt to become pregnant soon after a menstrual period than at any other time. The evidence also shows that the child was born after the full period of gestation, running from the time when she says she had such intercourse with appellant soon after one of her menstrual periods. There is also evidence in the record from which the jury could have found that appellant had admitted that he was the father of the child. But our courts have gone so far as to say: "There is no doubt, however,

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that there are or may be circumstances enabling a female to determine to which of two or more connections her conception is due." *Goodwine v. State, ex rel.*, 5 Ind. App. 63; *Kintner v. State, ex rel.*, 45 Ind. 175. Taking the facts as we have stated them, and applying the rule of law to them which we have just quoted, it was a reasonable conclusion, and one fully sustained by the facts, that the jury reached. The instruction complained of correctly stated the law, was not misleading, and was applicable to the facts.

Appellant's last point of discussion is that the court erred in refusing to give instruction number two tendered by him. By this instruction, the jury were told that if it is only by inference that a female can fix the paternity of her offspring, and that she had intercourse with different persons at or about the same time she became pregnant, she thus places it beyond her power to draw any safe conclusion upon the subject; and if they found that the relatrix about the time conception occurred had intercourse with persons other than the defendant, under circumstances which were adequate to produce pregnancy, and that there was no circumstance by which she could determine in favor of either, their verdict should be for the defendant. If we concede without deciding that this instruction was a correct exposition of the law, it was not error to refuse it, for the reason that it was substantially embraced by instruction number four given by the court. In the latter instruction, the court told the jury that if they should find that about the time the relatrix became pregnant she had sexual intercourse with the defendant and also with a person or persons other than the defendant, and that they were unable to determine from the evidence from which act of intercourse conception resulted, their verdict should be for the defendant. When we consider both of these instructions within the light of the evidence, we are unable to discover any error in refusing to give the instruction refused. While it was a little broader than the one given, and contained one or more addi-

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tional elements, yet the substance of it was covered by instruction numbered four given. The real substance of both instructions was that if it was found that the relatrix had sexual intercourse with persons other than appellant, at or about the time she became pregnant, and the jury were unable from the evidence and the circumstances detailed to determine from what act of intercourse conception resulted, then their verdict should be for the defendant.

It has long been the rule that it is not reversible error to refuse an instruction when the substance of it has been given in another instruction. *Westbrook v. Aultman, etc., Co.*, 3 Ind. App. 83; *Cleveland, etc., R. Co. v. Wynant*, 134 Ind. 681; *State, ex rel., v. Sutton*, 99 Ind. 300; *Blizzard v. Applegate*, 61 Ind. 368; *Jennings v. Howard*, 80 Ind. 214; *Atkinson v. Dailey*, 107 Ind. 117; *National Benefit Assn. v. Grauman*, 107 Ind. 288; *Terry v. Shirely*, 93 Ind. 413; *Louisville, etc., R. Co. v. White*, 94 Ind. 257. The court did not err in refusing to give instruction number two, tendered by appellant. We have disposed of all the questions discussed by appellant and do not find any error in the record. Judgment affirmed.

THE STATE v. ROBERTSON ET AL.

[No. 3,188. Filed November 29, 1899.]

COUNTY COMMISSIONERS.—*Allowance of Illegal Claim.—Indictment.—Criminal Law.*—An indictment alleging that the members of a board of county commissioners allowed a claim against the county which they knew to be illegal does not charge a crime under the provision of §2018 Horner 1897 that “any officer under the Constitution or laws of this State * * * who fails to perform any duty in the manner and within the time prescribed by law, shall, upon conviction thereof be fined,” etc.

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley and J. A. Zaring, for State.

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C. C. Matson, J. Giles, J. C. Lawler, M. B. Hottel and W. H. Edwards, for appellees.

WILEY, C. J.—Appellees Robertson and Trueblood were members of the board of commissioners of Lawrence county. One John W. Cosner was also a member of said board. On the 15th of November, 1897, said Cosner filed in the auditor's office to be presented to the board of commissioners a claim for \$100 for alleged and pretended services claimed to have been rendered by him as such commissioner in looking after the building and repairs of gravel roads when not sitting as a member of such board, and not for any services rendered by him while attending any session of said board. At its next session, the board of commissioners, the appellees acting as such, allowed said claim and ordered it paid. For this action they were indicted. The indictment, after reciting the above facts, is in the following language: "That said county and said board were in nowise indebted to said Cosner for any salary or per diem, nor on any account whatever, and nothing was due on said claim, but the same was wholly without warrant of law, and in excess of the fees, compensation, and rewards allowed in said county by law to county commissioners for the performance of official duties. That said Cosner caused said claim to be presented to said board on said 27th day of November for consideration and action. That it was then and there the duty of said board to reject said claim by voting to disallow the same, but said Robertson and Trueblood did then and there unlawfully and extorsively fail and refuse to perform said duty within the time in the manner prescribed by law by then and there unlawfully and extorsively failing and refusing to vote to reject said claim, and then and there unlawfully voted to allow said claim well knowing its illegal character, and said claim was then and there allowed and paid." Like the case of the *State v. Trueblood*, ante, 31, recently decided by this court, it is claimed by the prosecuting attorney and the

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Attorney-General that this prosecution is based upon §2018 Horner 1897, which they are pleased to call the "extortion act." That part of the statute relied upon as embracing the crime charged against appellees is as follows: "Any officer under the Constitution or laws of this State, who * * * fails to perform any duty in the manner and within the time prescribed by law, shall, upon conviction thereof, be fined," etc.

On motion of the appellees, the trial court quashed the indictment; the State excepted, and on appeal has assigned the sustaining of the motion to quash as error. The indictment proceeds upon the theory that Cosner, who was a member of the board of commissioners, had filed with the auditor of the county a pretended claim against the county, for which there was no warrant or authority in law, for which the county was in nowise liable, and that it was the duty of appellees, sitting as the board of commissioners, to vote to reject the claim, and that in voting to allow it, they violated that provision of the statute which says that "any officer * * * who fails to perform any duty in the manner and within the time prescribed by law shall be amenable to the penalty prescribed therein."

Whether the act charged constitutes a crime, as defined by §2018, *supra*, depends upon the meaning of the statute and the construction that must be placed upon it. Most of the duties of public officers under the Constitution and laws of this State are prescribed by the Constitution and the laws. When such Constitution or laws prescribe any duty to be performed and fix a time in which it shall be performed, a failure or refusal to perform such duty may not only be enforced by mandate, but the failure would constitute such nonfeasance in office as would be punishable under §2018, *supra*. Thus, a township trustee is required by statute to meet at a fixed time with all other township trustees of the county for the purpose of electing a county superintendent of schools. If he refuses to meet, he may be com-

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pelled to do so by mandamus, and for a failure to do so he may be prosecuted under §2018, *supra*, for a failure to perform a "duty in the manner and within the time prescribed by law." *Wampler v. State*, 148 Ind. 557, 38 L. R. A. 829, is in point. There appellant was a township trustee, and absented himself from the meeting of trustees, fixed by the statute to be held the first Monday in June, and by his absence prevented a quorum and the election of a county superintendent. A mandamus proceeding was brought against him to require him to meet with the other trustees to elect a superintendent. In deciding the case the court, by Jordan, J., said: "When public officers, charged with the execution of the law, refuse to obey its mandates, or wilfully ignore them, the evil results which must necessarily follow from such acts, tend to undermine the very foundation of civil government. When such officers fail or refuse to discharge their plain duties under the law, not only do they violate their official oaths, but also subject themselves to the penalty imposed by §2018 R. S. 1881, §2105 Burns 1894." Again, a township trustee is prohibited from creating a debt against his township beyond a fixed limit without first obtaining the consent of the board of commissioners of his county. The statute, however, fixing such limit, does not provide any penalty for its violation. In *Duty v. State*, 9 Ind. App. 595, appellant was indicted under §2105, *supra*, for failing to perform a public duty, in that he created a debt against his township beyond the limit fixed by law, and without first obtaining the consent of the board of commissioners. This court held, in a well considered opinion by Rhinehard, C. J., that a prosecution under the statute quoted would lie, and a judgment of conviction was affirmed. Both of the cases referred to rested upon an express and explicit failure to perform a public duty "in the manner and within the time prescribed by law." The learned Attorney-General has called our attention to the cases of the *Board, etc., v. Heaston*, 144 Ind. 583, 51 Am. St. 192, and *Wint-*

rode v. Renbarger, 150 Ind. 556, in support of the sufficiency of the indictment. The first of these cases cited was an action to recover a large sum of money alleged to have been illegally paid to the auditor of Huntington county by the board of county commissioners for services pretended to have been rendered. As a defense, the auditor pleaded the allowance of the claim by the board of commissioners, and contended that it was an adjudication of the question. It was held that the allowance of the claims having been unlawful, such allowance did not bind the county. The court by Jordan, J., said: "If, under the facts in the case at bar, we should place the construction on the law as contended for by appellee, then a way would be paved by which it would be rendered easy for any person, under the guise of a legal claimant against a county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully obtain and appropriate to his own use the public money, and when called upon in a court of justice to account for the same, deny the right of the county's recovery upon the ground of *res adjudicata*. Such in reason is not the law." We are unable to see what support this case gives to strengthen or uphold the indictment before us. We have no doubt under the holding in that case, and upon sound legal and equitable principles, but what the money alleged to have been paid Cosner, if it was unlawfully paid, could be recovered from him in a court of justice. If its allowance was unlawful the commissioners did not act within the scope of their authority, and hence such action was not *res adjudicata*. There is no intimation in the opinion that for making the allowances to the auditor the commissioners were liable to prosecution under §2105, *supra*, for a failure to perform a duty in the manner and within the time prescribed by law, in that they neglected to vote to reject and disallow the claims. In the second case referred to, *Wintrode v. Renbarger*, *supra*, appellant sued appellee for slander. There were two paragraphs of com-

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plaint, and each charges the speaking of alleged slanderous words. The words charged in the first paragraph were: "You are starving men to death in jail," and by innuendo it was alleged that appellee meant to charge appellant with a felony in attempting to murder prisoners by starvation. In the second paragraph, the alleged slanderous words were: "Yes, you are keeping the jail a d—d sight worse than 'Libby Prison,' " with the following innuendo: "Meaning and intending to charge that plaintiff, as keeper of the county jail, was torturing and starving and maltreating the prisoners under his charge and violating his official duties to provide for them food, as the law requires him to do; and he further avers that the false and defamatory phrase referring to Libby Prison, was meant the prison that was known during the War of the Rebellion as Libby Prison, and which was reputed to be, as a historical fact, and understood by the people generally, that such prison was being so conducted during the years of the war that prisoners of war imprisoned therein were not fed sufficient food, and that the quality thereof was bad, insomuch that the prisoners died of scurvy, and that they were starved and shot on the merest pretense by the persons in control thereof." It is made the duty of the sheriff to keep the county jail, and among other duties prescribed for him to perform are the following: "He shall provide proper meat, drink and fuel for prisoners." §6118 Horner 1897. By another section, he is required to "take care of the jail and prisoners therein." §5868 Horner 1897. By these statutes, it is made the express duty of a sheriff to furnish prisoners under his charge and in the county jail all necessary and suitable food, drink, and fuel. It is the policy of the law, and the dictates of enlightened and progressive civilization, that even the unfortunate and those who have offended the majesty of the law should receive humane treatment and be provided with the necessities of life. It being the statutory duty of a sheriff to furnish prisoners under his charge with necessary food, drink, and

fuel, his failure to do so would constitute a crime under §2018, *supra*, and it was upon this ground that it was held in *Wintrode v. Renbarger, supra*, that the words alleged to have been used by appellee in connection with the innuendo charged appellant with a crime, and hence were slanderous. True the statute does not provide any time, or prescribe the manner in which a sheriff shall provide the necessary food, drink, and fuel for his prisoners, for such a provision would be useless. The plain meaning of the statute is that such duty shall be performed as the necessities and conditions require.

With this extended reference to the case last cited, and the comments thereon, we are constrained to say, with all due deference to the Attorney-General, that the case does not lend any aid in support of the sufficiency of the indictment before us. It is rather against his contention, for we have shown that the decision rested upon the fact that the words used, with the innuendo, charged appellant with neglecting the performance of an official duty "in the manner and within the time prescribed by law," and "the words charged at least imputed such a crime." Every construction by the courts put upon that part of the statute under consideration has been based upon an express and explicit violation of some certain and definite statutory duty. We fully agree with the Attorney-General that the authorities clearly indicate that where public officials neglect to perform an official duty they are subject to punishment under §2018, *supra*. We will even go farther and say that where a public officer fails or neglects to perform any duty in the manner and within the time prescribed by law, he violates the statute, and may be punished accordingly. But we can not believe that in enacting the statute it was the intention of the legislature that it should be so broad and comprehensive as to include within its meaning the act charged against the appellees. County commissioners have a wide latitude under the law in the allowance of claims against their respective

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counties. A brief reference to some of the sections of the statute will verify this. §7830 Burns 1894, prescribes the powers and duties of county commissioners. By subdivision second they are empowered to allow all accounts chargeable against the county not otherwise provided for, etc. §7846 Burns 1894, provides that: "The county commissioners shall examine into the merits of all claims so presented; and may, in their discretion, allow any claim, in whole or in part, as they may find it to be just and owing." By §7850 Burns 1894, it is provided that, "The boards of commissioners may make allowances at their discretion." None of these statutes makes any reference to the manner, or within what time, county commissioners shall act upon claims filed against the county. The State contends that it was the duty of appellees, sitting as a board of county commissioners, when the claim of Cosner was presented to them for consideration, under the facts charged in the indictment, to vote to reject and disallow it, and that their failure so to vote was a failure to perform a duty in the "manner and within the time prescribed by law." To put such a construction upon the language of the statute would, it seems to us, be reading something into it which the legislature never intended. When the statute under consideration was enacted, there were many statutes prescribing the duties of public officers under the Constitution and laws, and which also prescribed the manner and fixed the time in which their duties should be performed, and it was the evident intention of the legislature in passing the statute that it should embrace and reach those officers whose duties were so prescribed, and the manner and time of their discharge fixed. Counsel for the State say that if appellees are not punishable under this statute on account of the act charged against them, then there is no statute by which they can be punished. In this they may be correct, but as to that question we decide nothing. The only question now before us is whether appellees are punishable under §2105, *supra*, upon the facts charged.

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If there is no other statute covering the crime charged and prescribing a punishment, the fault is not with the court. Courts do not make laws, but seek to construe and enforce them as they come from the law-making branch of the government.

We have given to the question involved much thought and careful consideration, but we can not adopt the view contended for by counsel for the State. That grave wrongs are perpetrated against the rights of the public by public officers under the guise of the law, and where adequate punishment is not prescribed, there seems to be no question; but to remedy the evil, we must look first to the legislature and then trust to the courts to enforce the laws it makes.

The trial court did not err in sustaining the motion to quash. Judgment affirmed.

BRAY v. MILES, EXECUTOR, ET AL.

[No. 2,767. Filed June 30, 1899. Rehearing denied Nov. 29, 1899.]

WILLS.—Construction.—Parent and Child.—Adoption.—Under a clause in a will giving property to three sons and a daughter of testator, and providing that in the event of the death of either of the four "the shares due such as may be deceased shall go to the children of such deceased person, if there be children, and if there be no children, then such share shall go to the survivors," upon the death of the daughter before the bequest became operative, without issue, her adopted child was entitled to take her share by the provision of §826 Horner 1897 that the adoptive parents shall occupy the same position to an adopted child as natural parents. Wiley, J., dissenting.

From the Hendricks Circuit Court. *Reversed.*

G. W. Brill, G. C. Harvey, R. W. McBride and C. S. Denny, for appellant.

E. G. Hogate, J. L. Clark, T. J. Cofer and R. T. Hollowell, for appellees.

COMSTOCK, C. J.—The questions submitted to the court in this case involve the construction of the statute of this

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State, concerning the adoption of heirs, and the application of that statute to the will of John Miles, who died testate, at Hendricks county, Indiana, June 23, 1896, and whose will was duly probated in that county. In order to present the question, we quote three items from the will, a copy of which is set out in the record:

“(2) I will, give, and bequeath to my two sons, Thomas J. Miles and John A. Miles, in trust, all my personal estate, including money on hand and due me from every source, the same to be safely and prudently used and invested so as to yield an income; and from said personal estate and the income therefrom I desire and direct that my wife, Elizabeth Miles, and my two invalid daughters, to wit, Emily Miles and Jane Miles, shall be provided with a comfortable maintenance and support in sickness and in health, and a comfortable and suitable home so long as they or any of them shall live; and in the event that for any cause my sons above named fail to execute this clause of my will, I direct that the Hendricks Circuit Court shall appoint some competent and suitable person who shall fully execute this trust, and shall give bond for the faithful performance of his duties in relation thereto. In the performance of the duties imposed by this provision of my will, I hereby authorize my said sons, Thomas J. Miles and John Miles, or whomsoever may act in their stead as aforesaid, to dispose of my salable personal property at such time and in such manner as will in their judgment best subserve the purpose hereinbefore specified, but such executors shall make a complete inventory of said personal estate, as required by law, to be filed with the clerk of the Hendricks Circuit Court, and shall report to said court at least once in every two years a true and complete account of all money received and paid out by them; and said executors shall be allowed fair and reasonable compensation for their services, to be allowed and approved by said court.

“(11) It is my will, and I hereby expressly declare it to

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be the first object of this will, that my said wife, Elizabeth Miles, and my two invalid daughters aforesaid, Emily Miles and Jane Miles, shall be fully and comfortably provided and supplied with all the necessities and ordinary comforts of life, including a comfortable home, and that my wife shall keep and retain in her possession all such household goods as they may need, and if my personal estate shall not be sufficient to so maintain them so long as they or any of them shall live, then, and in such case, they or any of them, shall have and hold a lien upon all of the real estate which is hereby devised to my children.

“(12) I hereby will and direct that all of the surplus of my estate, after the execution of the several items and clauses of this will above mentioned, shall be distributed among my several children, Martha, Thomas J., John A., and Samuel W. Miles, so as to make them equal in the distribution thereof, and in the event of the death of any one of the last above named the shares due such as may be deceased shall go to the children of such deceased person, if there be children; and if there be no children, then such share shall go to the survivors.”

The testator survived his wife. All of the children named in the clauses above quoted survived the maker of the will, but the two invalid daughters are now dead. The daughter Martha, who is named in item twelve of the will, is also dead. The testator's three sons, Thomas J., John A. and Samuel W. are living, and have wives and children living. Martha was, when the will was made, and when she died, a married woman, the wife of one Columbus Walker, but never bore any children. During the lifetime of John Miles, the maker of the will, she, with the knowledge of the testator, adopted the appellant, the adoption having been duly and regularly made under and by virtue of the statutes of this State, concerning the adoption of heirs. The appellant, as such adopted daughter, claims that she is in law the child of and is entitled to the share of her adopted mother, under item

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twelve of the will. Martha was born January 14, 1841, became the wife of Columbus Walker, named in the will, on October 27, 1870, and was his wife at the time of her death on December 2, 1891. At the time of the marriage she was twenty-nine years old. She had been married thirteen years when the will was made. Thomas J. Miles, the only one of the executors named in the will who seems to have acted, filed a final report, showing the death of the widow and the two invalid daughters, claiming that he had fully acquitted himself of the trust created in their behalf by the will, and that there remained for distribution under item twelve of the will \$40,663.83, which was represented by notes and bank stock. He further showed the death of his sister Martha; that she had borne no children, but had adopted the appellant, who survived her; that he and his two brothers named in item twelve of the will, with said Martha, as residuary legatees, having concluded that their sister's adopted daughter was not her child, and that she was not entitled to share in the distribution of said sum, had agreed upon a division of the same among themselves, which they asked the court to approve and confirm, ignoring the appellant as having no right to share in the distribution. The appellant filed exceptions to this report, showing the fact, the time, and the manner of her adoption, and asking that she be allowed to share in the distribution. The court, upon the motion of the executor, struck out her exceptions. This ruling is assigned as one of the errors. Thereupon the appellant filed her petition for distribution. When the final report of the executor and the petition for distribution were submitted to the court for hearing, the court was requested by the parties to make a special finding of the facts, and state its conclusions of law thereon, and did so. The appellant excepted to the conclusions of law, which were adverse to her. If the appellant, as the adopted child of Martha Walker, is entitled to take the share of her adoptive mother, the action of the trial court was erroneous and the case should be reversed.

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Appellant claims that by virtue of her adoption, and in law, and in everything which concerns her property rights, she is the child of Martha Walker. That Martha Walker being dead when the time came for the distribution of the surplus under item twelve of the will, the appellant as such child was entitled to the distributive share which would have gone to her adoptive mother if she were then living.

The will designates a class, children, as beneficiaries. The question presented, therefore, is whether under the statute appellant is a child of Martha, the daughter of the testator. Can she be identified as a beneficiary named in the will? It is conceded that she cannot take by inheritance from the decedent. Adoption has been defined to be "the act by which a person appoints as his heir the child of another. *Abney v. DeLoach*, 84 Ala. 393, 4 South. 557. The object of adoption is to place as nearly as possible the child adopted in the place of a natural one; to give it the position in the family as the child both of the husband and wife, conferring on it rights and privileges of a child. Among other consequences, the effect of adoption is to cast succession upon the adopted in case of the intestacy of the adopting father. Adoption was unknown to the common law. It was regulated by law in Greece and Rome. In Rome the system was in vogue before the time of Justinian. He reduced the system, which prior to his time was encumbered with formal ceremonies, to a code which simplified the proceeding, and from which modern legislation upon the subject has derived its chief features, adapting them to our wants. It was introduced as a part of the civil law in this country from France and Spain respectively to Louisiana and Texas. For the reason that it is purely statutory and in derogation of the common law, it has frequently been said that it is to be strictly construed. This expression occurs in the reported cases in which the jurisdiction of the officer or tribunal or the regularity of the proceedings of adoption have been called in question. The statute is not to be so strictly construed as to

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defeat its purposes. §838 Burns 1894, §826 Horner 1897, reads: "After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education and every other way responsible as a natural father or mother." The name of the child is changed; its identity is lost in that of the adopting parents; it becomes in all but blood their child.

In *Martin v. Aetna Ins. Co.*, 73 Me. 25, it was held that an adopted child falls within the terms "children" when there is no other person that answers that description.

In 5 Am. & Eng. Ency. of Law, p. 1098, it is stated that the words "child" or "children" usually include an adopted child, citing *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Stanley v. Chandler*, 53 Vt. 624; *Keegan v. Geraghty*, 101 Ill. 40.

In *Clifton v. Goodbun*, L. R. 6 Eq. 277, the word "children," in the will of a bachelor was held to mean illegitimate children, as he could have no other.

In *Vidal v. Commagere*, 13 La. Ann. 516, the court held, under a statute which allowed a married couple to adopt an orphan child, that when adopted the child became to all intents and purposes the child of the adopting couple. The court said: "We conclude, therefore, that, as by the common acceptation of the word adoption, the relationship of parent and child with all the consequences of that relationship is understood, as such was the legal meaning of the word under the former laws of Louisiana, and as such is its acceptation among civilians and those conversant with the sources of our laws, we cannot say that the legislature used the word in a more restrained sense; in a sense not understood in common parlance, not given in any dictionary, and not known in any system of laws. As by the former laws of Louisiana, the person adopted bore the relation of child to the person adopting, and inherited his estate, so we think the legislature, by the solemn expression of its will, intended

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to confer the same right upon the plaintiff to the estate of those who were authorized to adopt her.”

In *Estate of Wardell*, 57 Cal. 484, in construing the word “children” in the statute of descent, the court says, it “must relate to *status*, not to origin—to the capacity to inherit * * * its meaning includes all children upon whom has been conferred by law the capacity of inheritance.” In this case, a woman’s will was set aside because it made no provision for an illegitimate daughter, the statute providing that “When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate.”

In *Power v. Hafley*, *supra*, the court, in discussing numerous cases upon the subject of adoption, said: “When the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties.”

The Supreme Court of this State has construed the statute in the following and other cases: *Barnes v. Allen*, 25 Ind. 222; *Markover v. Krauss*, 132 Ind. 294, 17 L. R. A. 806; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Krug v. Davis*, 87 Ind. 590; *Davis v. Krug*, 95 Ind. 1; *Humphries v. Davis*, 100 Ind. 369; *Paul v. Davis*, 100 Ind. 422; *Isenhour v. Isenhour*, 52 Ind. 328; *Keith v. Ault*, 144 Ind. 626; *Patterson v. Browning*, 146 Ind. 160.

In *Markover v. Krauss*, *supra*, the court said: “‘He who is either adopted or arrogated is assimilated in many points to a son born in lawful matrimony.’ * * * Adoptive children, so long as they are held in adoption, are in the position of children born to us. * * * The adopted child, while held in the bonds of adoption, was still in the position of a natural child, or a child born to the adopting father. Not, as is said in *Humphries v. Davis*, *supra*,

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that the law contemplated to do the work of nature and create a child of one's blood out of a stranger, but, that the law could, and did make the legal status of the one in every respect that of the other. Thus, the son of the adopted son was by the law made the grandson of the adopting father, with all the legal rights incident to that relation." After quoting from *Vidal v. Commagere, supra*, the court says: "Viewing this statute in the light of the civil law, it seems clear to us that the legislative intention was to give to adopted children the same relation to adopted parents that was given them by the civil law; that, in so far as property rights are concerned, it was the intention to give to them the same rights as if they were their natural children, or children of their blood; and, when the adoption is joint, that they should, as to all property rights, be, in the eye of the law, *children of the adoptive father by the adoptive mother*." The court in the same case declined to consider a construction of the statute which would favor natural as against adopted children in the following language: "If, however, they are all adopted children, under the construction contended for by the appellant, the widow will take one-third in fee, thus excluding them from all participation in that portion of the estate. The effect of such a construction would be to discriminate in favor of natural and against adopted children, and, in the face of the plain, unequivocal language of the statute, and of the established rules of the civil law, to deny to adopted children the equal rights said to be theirs by virtue of their adoption."

In *Barnes v. Allen, supra*, the court said: "Under §3 of the 'act regulating the adoption of heirs' *supra*, they were the heirs of the adopting father, in the degree of children."

In *Krug v. Davis, supra*, the court said: "The obvious purpose of the statute before us was to authorize the incorporation of the children of other persons into families desirous of assuming control over them, and in that way to sanction the formation of new and artificial family relations between

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persons not necessarily of the same blood. It evidently contemplates that persons desirous of adopting children under it shall be of suitable age to enter into parental relations, but as to such persons it applies as well to those who are married as to those who are unmarried. It would be inconsistent with the general scope and purpose of this statute to permit two or more persons representing different families to jointly or concurrently adopt the same child, but that objection, in our estimation, does not apply to joint proceedings by husband and wife for the adoption of a child. On the contrary, the better and more reasonable construction appears to us to be that a wife may unite with her husband in such a proceeding as, from the very nature of things, the interests of the entire family are necessarily involved in the object sought to be accomplished by it. There is not only no inconsistency, but a manifest propriety, in the wife thus uniting with her husband, as, by doing so, the adopted child is made to assume, in a general sense, the same position in the family which it would occupy if it were the natural child of both, born in lawful wedlock. * * *

“It is clear to us that the leading and controlling purpose of the framers of the statute under examination was to place an adopted child as nearly as possible in the place of a natural one; to give it a position in the family as the child both of the husband and wife. In a matter which so nearly concerns the interests of the wife and so deeply affects the welfare of the child, it is eminently proper that the husband and wife should unite in making the child their own. * * *

“The purpose which the statute we are examining was intended to accomplish was to enable parents to adopt as their own the children of others, and to secure for the adopted child the parental affection of both a father and a mother. As the adopted child of both the husband and wife, it would stand much more nearly in the place of a natural child than if it was made the child of only one of them by adoption, and this was where the legislature meant it should stand. * * *

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“The effect of our decision is to place a child adopted by a husband and wife jointly in substantially the same position as that of a natural child, and when the child takes this place there are long settled rules which will determine and control the rights of all the interested parties, and there is then neither confusion nor uncertainty.”

In *Humphries v. Davis*, 100 Ind. 274, the court said: “If, as the civil law so fully provided, a child of the adoptive son stood in the relation of grandchild to the adoptive father, then the son himself must stand as the child of that father.”

From the case of *Paul v. Davis*, 100 Ind. 422, we quote the following: “The adoptive child does become the stirps or stock of inheritance, but to whom does it sustain this relation as to property acquired by inheritance from the adoptive parents? Doubtless, this relation exists between such a child and its children; they are of the original stock of descent, for they bear the relation of grandchildren to the adoptive parents. The legal relation does not end with the death of the adoptive child, and so the line of descent goes back, in default of wife or children, to the source from which the property came. * * *.

“In the earlier case of *Barnes v. Allen*, 25 Ind. 222, it is clearly implied that the relation between the adoptive parent and the adoptive child is that of parent and child, with the reciprocal right of inheritance.”

The case of *Markover v. Krauss*, 132 Ind. 294, has been cited and approved, in *Keith v. Ault*, 144 Ind. 626, and in *Patterson v. Browning*, 146 Ind. 160. In the former, at page 628, the court says: “It is not questioned that by the statute for the adoption of heirs, already cited, the appellant was ‘entitled to receive all the rights and interest in the estate’ of her adoptive father that she would have received if she had been his natural child. As a matter of fact, her rights as the child of James H. Lemmon were fully recognized in the partition of his real estate, a child’s full part

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being set off to her, subject, as in the case of other children, to the payment of her father's debts. * * * No doubt, if Georgiana had been adopted by both Mr. and Mrs. Lemmon she would have inherited from Mrs. Lemmon as any other child from its parents."

In *Patterson v. Browning*, 146 Ind. 160, there was a controversy between natural children and an adopted child. James C. Inwood adopted one Bessie Miffel as his child, her name being changed at the time to Bessie Inwood. At the time of the adoption he had four natural children. He died seized in fee simple of certain real estate, leaving as his heirs the four natural children, the adopted child, and a childless second wife. The wife took under the statute the one-third of his real estate. She afterwards married one Browning, who adopted the said Bessie Inwood, and her name was changed to Bessie Browning. The widow died, and the natural children of Inwood claimed the one-third of their father's estate which the widow had taken descended to them to the exclusion of the adopted daughter. The court said: "Upon this state of facts the appellants claim that the real estate in controversy descended to them as the forced heirs of said widow to the exclusion of all others, and especially to the exclusion of the appellee." The court reached the conclusion that the adopted child was entitled to inherit as a natural child.

Counsel for appellee insist that while the statute of this State fixes the status of the adoptive parent and the adopted child to be that of parent and child under adjudicated cases of our courts, that it by no means follows that they occupy the same relation to each other as to descent of property as a natural parent and child. The following distinctions are pointed out in the status of the adopted and natural child. The parent of a natural child who dies without issue in this State inherits the property of such child regardless of the source from which it was acquired. The adoptive parent only inherits such property as has come to the adopted child

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through the adopting parent, while all other property of such adopted child is inherited by his natural kinsmen. *Humphries v. Davis*, 100 Ind. 274; *Davis v. Fogle*, 124 Ind. 41, 7 L. R. A. 485. Where a natural child is born after the execution of a will, without provision being made in the will for such child, such fact revokes the will; while the adoption of a child after the execution of a will making no provision for such child does not have that effect. An adopted child inherits from its natural parents, but not from the relatives of the adopting parent. Citing *Davis v. Fogle*, *supra*; *Humphries v. Davis*, *supra*. Appellant's learned counsel cite *Keegan v. Geraghty*, 101 Ill. 26; *Miller v. Rappley*, 163 Ill. 22; *In re Jessup's Estate*, 81 Cal. 408, 21 Pac. 976, and 22 Pac. 742, 6 L. R. A. 594, in support of the proposition that an heir is a creature of the law, and so far as the adopted child is concerned, a creation of statutory law, and we recognize the correctness of the position. Appellee cites numerous authorities holding that the adopted child does not become the child in fact of the parents making the adoption, and that the statutes upon this subject have generally attempted to fix only the status of the adopted child as to his rights to inherit by descent from them, and that the general rule is that an adopted child cannot take by descent from the ancestors of the adopting parents. The following are the cases cited to sustain appellees' claim. 24th Am. Eng. Ency. of Law, 424; *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521; *Sunderland's Estate*, 60 Iowa 732, 13 N. W. 655; *Keegan v. Geraghty*, *supra*; *Davis v. Fogle*, *supra*; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729; *Barnhizer v. Ferrell*, 47 Ind. 335; *Russell v. Russell*, 84 Ala. 48, 3 South. 900; *Schafer v. Eneu*, 54 Pa. St. 304; *Barnes v. Allen*, 25 Ind. 222. But, as contended by appellant, and as we conceive the question to be, the property rights of children as an abstract proposition are not involved in this appeal. The question is one of the identification of a legatee. By the terms of the will, as we have

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seen, in the event of the death of any of the four children named in item twelve, the shares of those deceased shall go to their children, "if there be children, and if there be no children, then such shares shall go to the survivors." When the will became operative, Martha was dead, leaving appellant, an adopted child, surviving her. Her rights of inheritance are not material because she is claiming nothing as an inheritance. Her claim is based solely on the will and the statute which makes her, as the adopted child of Martha a legatee, because she is, under the law, the child of Martha, and, irrespective of any right of inheritance, a legatee. Had Martha left a natural and an adopted child, we think there could be no question but that both would have taken equally as legatees. In such case appellant would have taken only by virtue of the status given her by the adoption. She is none the less the child because Martha left no child of her body. The testator could have named his legatees "children of her body," "children born to her," "children of her blood," or, "to her issue," or to the "heirs of her body," or by the use of "apt words" could have excluded the adopted child.

The case of *Davis v. Fogle, supra*, cited by appellees, involved the construction of §2730 Burns 1894, providing that "if after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, * * * the will will be deemed revoked." The court decided that an adopted child was not a child born to the parent adopting it. The will in question did not provide that in case of the death of any of the children named, the share of the deceased should go to his "legitimate issue," provided he had legitimate issue born to him who should survive him. Appellees strongly rely upon the case of the *New York Life Ins. Co. v. Viele*, 22 App. Div. 80, 47 N. Y. Supp. 841. The facts in that case showed that the testatrix, Mary Griffin, removed from America to Saxony, in the year 1855. She executed a will August 6, 1878, in which, after making several speci-

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fied bequests in the first clause of the will, by the second clause the testatrix gave all the residue of her estate to her executors in trust; and by the third clause, the executors were directed to invest one-third part of the residuary estate and to apply the net income derived therefrom to the use of her daughter, Emily S. Lengnick, during her lifetime, and upon her decease, the testatrix directed "that the principal of such share be paid over or transferred by my executors to her then 'living lawful issue,' if any, and, if she leave her surviving no such issue, I direct that the same shall then be added in equal parts or proportions to the principal of the several shares of my residuary estate, hereinafter directed to be held in trust for my ten grandchildren, hereinafter named."

The testatrix died at Dresden, Saxony, March 9, 1888, where she had resided for many years. Her daughter Emily was married to Major Lengnick, a citizen of Saxony. Mrs. Lengnick had had two children, both of whom died in 1872. She continued to reside at Dresden, until her death in 1893, having had no children except the two who had died in 1872. At the time of the making of the will, Mrs. Lengnick was about forty years old, and living with her husband at Dresden, but was in poor health. In the year 1873, one year after the death of her two natural children, and about five years before the execution of the will in question, Mrs. Lengnick and her husband adopted, under the laws of the Kingdom of Saxony, a niece of the husband, Olga Felicate Lengnick, who it is conceded was legally adopted under the provision of the Saxony law, and without any limitation in the contract of adoption against her right to inherit. And she insisted as the adopted daughter of Mrs. Lengnick she was the lawful issue of Mrs. Lengnick, and as such was entitled to the trust estate that was created by the third clause of the will. The court held that it was clear that the testatrix did not intend that this share of her estate, given to her daughter Emily for life, should, upon her death, go to

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this adopted child. The case is not in point. The adopted child could not take under the will in question, because the beneficiary was described as "the living lawful issue", a description which could not apply to an adopted child. The bequest over was to the living lawful issue of the primary legatee, Emily Lengnick, who died leaving no child except an adopted daughter. The adopted child was not the issue of the primary legatee, nor was issue synonymous with children. One's issue is necessarily one's child, but a child in law is not necessarily one's issue. The legal status of parent and child may exist between those not of the same blood; a status created by statute. Thus in *Patterson v. Browning*, 146 Ind. 160, the court says, in effect, that when the legislature uses the word children, without qualification, that the word is broad enough in its significance to include adopted with natural children. It does no violence to the rules of construction to place the same construction upon the word when it occurs in last wills. Counsel for appellee refer to the well settled rule that in every case in which a will is to be construed, the chief object is to ascertain from the language used in the will itself, considering the circumstances surrounding the testator and the objects of his bounty at the time of making the will, the intention and design of the testator. Appellees contend that there is nothing in the will itself, or the circumstances surrounding the testator at the time it was made, that tends in the remotest degree to indicate an intention upon the part of the testator that appellant should participate in the bequest in question. An examination of the will, together with the circumstances surrounding the testator at the time the will was made, as shown by the finding of the court, reveals the fact that John Miles, during his lifetime, had accumulated a large estate; that he had kept the whole of it in his own right and under his own control until his death; that he pledged every dollar of his large estate for the comfortable maintenance and support of his wife and two

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invalid daughters. That he had three sons, and but one daughter, Martha, besides those that were invalids. That he gave all of his property, after making provision for his wife and invalid daughters, to these three sons and his daughter Martha. That his said daughter Martha, at the time of making the will, was more than forty-two years of age, and had been married nearly thirteen years; that she had never had any children born to her; that the land he gave to his three sons he gave them in fee simple. That he gave an equal amount to his daughter Martha, during the life of herself and husband, which after death of both of them was given to his heirs at law. That they were not to sell the timber off of said land. It is claimed that these facts show that John Miles, at the time the will was made, believed his daughter would die without issue; because, believing thus, he provided that the real estate given his daughter Martha, at her death and the death of her husband should go to his other heirs; that there was a fixed purpose in his mind to keep his property in the line of his own blood.

It must be further remembered that the meaning of a last will is to be ascertained first from its language, when free from ambiguity. The testator knew of the adoption of the appellant nearly eighteen months prior to his death. It is the theory of appellees that he believed that no children would be born to Martha. Had he designed to exclude her from the participation in his estate, the time and opportunity were ample to have made that purpose known. The will bears evidence of the skill and learning possessed by the attorney drafting it, inconsistent with the theory that apt words were omitted from lack of either. The testator died with the knowledge that appellant, in law, though not in fact, was the child of Martha, and that a portion of the residuum of his estate would go to the children of Martha upon her death. He must be presumed in using the word "children" with no other designation to have so used that word in view of the statute and its interpretation by the Supreme Court.

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Johnson's Appeal, 88 Pa. St. 346; *Rowan's Est.*, 132 Pa. St. 299, 19 Atl. 82. It must be presumed that he knew a child adopted under the statute was described as the child of the adopting parent, and that the Supreme Court in interpreting the statute had declared that an adopted child was the child of the adopting parent. Under the statute and the decisions appellant answers the description of and is identified as a beneficiary under the will. The court erred in its conclusions of law. The judgment is reversed, with instructions to restate the conclusions and render judgment in accordance with this opinion.

DISSENTING OPINION.

WILEY, J.—I am unable to concur in the conclusions reached as announced in the prevailing opinion. To sustain that conclusion, a construction must be given to the will of John Miles, which, in my judgment, is so foreign to the manifest intention of the testator, as expressed by the entire will, that violence is done to such intention and object of the testator, and his estate, in part at least, is diverted from the purpose and channel plainly expressed. To hold that appellant, under subdivision twelve of the will, is entitled to share that part of the residue of the estate which Martha Walker, the daughter of the testator, would be entitled to share if she were living, is to hold that it was the manifest intention of the testator by that provision to give to her (appellant), who was alien blood to him, an entire stranger, in fact, not in legal existence at the time the will was made, and within its meaning, an equal share of his estate.

It seems to me that the crucial test in the construction of wills—the primary and universal rule of construction, to wit, that the intention of the testator must prevail, has been entirely overlooked by my associates in the prevailing opinion. It is fundamental in the construction of a will that the intention of the testator must prevail, and in arriving at that

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intention, courts in giving an interpretation may place themselves in the situation of the testator, examine the surroundings, and then from the language used arrive at his intention. *Corey v. Springer*, 138 Ind. 506; *Jackson v. Hoover*, 26 Ind. 511; *Price v. Price*, 89 Ind. 90; *Hartwig v. Schiefer*, 147 Ind. 64. Another familiar rule of construction is that, if there is any doubt as to the meaning of any clause or portion of a will, it will be construed as a whole. *Kilgore v. Kilgore*, 127 Ind. 276; *Eubank v. Smiley*, 130 Ind. 393; *Nading v. Elliott*, 137 Ind. 261; *Moore v. Gary*, 149 Ind. 51; *Kelly v. Stinson*, 8 Blackf. 387; *Baker v. Riley*, 16 Ind. 479; *Jackson v. Hoover*, *supra*; *Critchell v. Brown*, 72 Ind. 539; *Schori v. Stephens*, 62 Ind. 441; *Brumfield v. Drook*, 101 Ind. 190; *Pugh v. Pugh*, 105 Ind. 552. Another and wholesome rule which prevails in this State is that the construction of a will depends not so much upon any rigid principle of law as upon what appears by the will to have been the testator's intention. *Lutz v. Lutz*, 2 Blackf. 72; *Baker v. Riley*, *supra*.

In the majority opinion, only parts of the will are set out, but in view of the general rules and principles relating to the construction of wills, which I have referred to, I deem it important that the entire will here in controversy appear in full in this dissenting opinion. It is as follows:

"Item 1. I will and direct that all my just debts and funeral expenses be promptly paid.

"Item 2. I will and bequeath to my two sons, Thomas J. Miles and John A. Miles, in trust, all my personal estate including money on hand and due me from every source, the same to be safely and prudently used and invested so as to yield an income, and from said personal estate and the income therefrom I desire and direct that my wife, Elizabeth Miles, and my two invalid daughters, to wit, Emily Miles, and Jane Miles, shall be provided with comfortable maintenance and support in sickness and in health and a comfortable and suitable home so long as they or any of them shall

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live. And in the event that for any cause my sons above named fail to execute this clause of my will, I direct that the Hendricks Circuit Court shall appoint some competent and suitable person who shall fully execute this trust, and shall give bond for the faithful performance of his duties in relation thereto.

"In performance of the duties imposed by the provisions of my will I hereby authorize my said sons, Thomas J. Miles and John A. Miles, or whomsoever may act in their stead as aforesaid, to dispose of my salable personal property at such time and in such manner as will in their judgment best subserve the purpose hereinbefore specified. But such executors shall make a complete inventory of said personal estate as required by law to be filed with the clerk of the Hendricks Circuit Court, and shall report to said court at least once in every two years a true and complete account of all money received and paid out by them. And said executors shall be allowed fair and reasonable compensation for their services, to be allowed and approved by said court.

"Item 3. I give and devise to my daughter, Martha A. Walker, for and during her natural life, the full and free occupation and possession and all the rents, issues, incomes and profits of the following described real estate situated in the county of Hendricks and State of Indiana, viz.: The east half of the northeast quarter of section twelve, and the east half of the southwest quarter of section eleven, both in township fourteen north, of range one west, and also of the lands included in the following boundaries: Beginning at the half mile stake on the north side of section ten, township and range aforesaid; then south with section bearing 229 93.100 poles to a line cutting off seventy acres on the north side of the southwest quarter of said section ten; thence west with said line 45 93.100 poles to the section line; thence east with said line 45 93.100 poles to the beginning. Also, the west half of the northeast quarter of section ten, in township fourteen north, of range one west, and the west half of

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the southeast quarter of section three, in the same township and range, except thirteen acres off of the west side of the last described tract. And in the event that my said daughter Martha, and her husband Columbus Walker, continue to live together as husband and wife until the death of the said Martha, they shall both jointly use and occupy said lands and have the income therefrom. And if the said Columbus Walker shall live longer than my said daughter, Martha, then in that case the said Columbus Walker shall continue to have and enjoy the possession, rents, profits, and income of the lands aforesaid so long as he, the said Columbus Walker shall live, provided he shall not be allowed to sell the timber off of or from said lands, but he may use the same for necessary improvements or betterment of said lands, and at the death of said Martha, and Columbus Walker, the lands aforesaid shall descend to my heirs at law by virtue of the laws of descent in force at the time of my death.

“Item 4. In the event that my said son-in-law, Columbus Walker, shall survive his wife, I give and bequeath the sum of \$1,000 to be paid out of any surplus in the hands of my executors.

“Item 5. I give and devise to my son, Thomas J. Miles, the following lands in said county of Hendricks and State of Indiana, viz.: The west half of the southwest quarter of section thirty-six, township fifteen north, in range one west, and twenty acres off of the south end of the east half of the northwest quarter of section thirty-six; also the east half of of the southwest quarter of section thirty-six; also the northwest quarter of said section thirty-six, also the northeast quarter of section twenty-six in said township and range. Also, all that part of the west half of the southeast quarter of section twenty-three, and all that part of the southwest quarter of section twenty-three, which lies south of the middle of White Lick creek and which belongs to me. And also, all the lands I own in the northeast quarter of section thirty-six, township fifteen north, range one west.

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“Item 6. I give and devise to my son, John A. Miles, the following lands situated in the county of Hendricks and State of Indiana, viz.: All the east half of section thirty-two in township fifteen north, in range one east, and all the northeast quarter of section five, township fourteen north, range one east, which belongs to me, estimated to contain 433 acres.

“Item 7. I give and devise to my son Samuel W. Miles, the following lands situated in the county of Hendricks and State of Indiana, viz.: The west half of the southwest quarter of section two, township fourteen north, range one west, and so much of the southwest quarter of the northwest quarter of said section two as lies south of the public road leading from Belleville to Clayton. Also, the east half of the southeast quarter of section three, township fourteen, range one west; also the west half of the northwest quarter of section eleven; and the southeast quarter of the northwest quarter of said section eleven; also the east half of the northeast quarter of section ten, township fourteen north, range one west.

“Item 8. It is my will and I hereby direct that the lands hereinbefore devised to my three sons, to wit, Thomas J. Miles, John A. Miles, and Samuel W. Miles, shall be appraised within a reasonable time after my decease by three disinterested men to be agreed upon by my said sons who shall fix and set upon said several tracts of land the cash value thereof, without taking into account any buildings or perishable improvements thereon. And that if there be a difference in the value thereof, those of my said sons who receive the least in value of said lands shall be made equal with the other out of my estate as hereinafter provided.

“Item 9. I will and direct that my executors hereinafter named shall make sale either at public or private sale, as they may deem best, of the following lands situated in said county of Hendricks and State of Indiana, viz.: A part of the northwest quarter of section one, township fourteen

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north, of range one west, estimated to contain 43 75.100 acres, being the lands bought by me of James N. Pope, October 30, 1856, and with the proceeds of said land so far as the same may be sufficient, they shall equalize my three sons in relation to the value of the lands devised to them, when ascertained as aforesaid in item eight, of this will.

“Item 10. I give and devise to Oscar Stierwalt, \$100, to be paid out of any surplus at any time in the hands of my executors.

“Item 11. It is my will, and I hereby expressly declare it to be the first object of this will, that my said wife, Elizabeth Miles, and my two invalid daughters, aforesaid, Emily Miles and Jane Miles, shall be duly and comfortably provided and supplied with all the necessaries and ordinary comforts of life including a comfortable home. And that my wife shall keep and retain in her possession all such household goods as they may need, and if my personal estate shall not be sufficient to maintain them so long as they or any of them shall live, then and in such case they or any of them shall have and hold a lien upon all the real estate which is hereby devised to my children.

“Item 12. I hereby will and direct that all of the surplus of my estate, after the execution of the several items and clauses of this will above mentioned shall be distributed among my several children, Martha, Thomas J., John A. and Samuel W. Miles, so as to make them all equal in the distribution thereof. And in the event of the death of any one of the last above named, the shares due such as may be deceased shall go to the children of such deceased person, if there be children, and if there be no children, then such share shall go to the survivors.

“Item 13. I hereby nominate and appoint my two sons, Thomas J. Miles and John A. Miles, the executors of this my last will and testament.”

From the special finding of facts, and the will itself, it appears that the will was executed June 2, 1883; that

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Martha, the deceased daughter, was born January 14, 1841; that she married John C. Walker October 27, 1870; that she never had any children born to her; that she adopted appellant under the laws of Indiana January 9, 1885, and that decedent had knowledge of such fact. When this will was made, the testator had a wife, three sons and three daughters. Martha was twenty-nine years old when she married. When the will was executed, she had been married nearly thirteen years, was forty-two years old, and had never borne a child. As to the testator's wife and the two invalid daughters referred to in the will, I will not notice further, for they are each dead, and the will has been fully executed as to them. In this connection, in the recital of material facts, which appear by the will and record, the significant fact that the will gave to Martha and her husband a life estate only in the real estate willed to her, while it gave to all the other children to whom real estate was willed a fee simple interest, should not be overlooked.

When a child is legally adopted under the law of this State, the relation of parent and child is thereby created, and such adopted child will inherit under the laws of descent from its adopting parent as though it were a child lawfully born to such parent. As to this proposition, there seems to be no doubt. *Davis v. Fogle*, 124 Ind. 41, 7 L. R. A. 485; *Humphries v. Davis*, 100 Ind. 274. I think it equally plain also that such an adopted child cannot, under the laws of descent, inherit from the ancestors of the adopting parent. This is obvious by analogous reasoning when we consider the fact that a parent of a natural child, who dies without issue, inherits the property of such child regardless of the source from which it was acquired; while the adopting parent only inherits such property as has come to the adopted child through the adopting parent, and all other property of the adopted child goes to its kinsmen of the same blood. *Humphries v. Davis*, *supra*; *Davis v. Fogle*, *supra*. An additional instance showing the status and rights of a nat-

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ural child differ from those of an adopted child is that where a natural child is born after the execution of a will, where the will does not make provision for it, such birth revokes the will; while the adoption of a child, after the making of a will, where no provision is made for such adopted child, such adoption does not revoke the will. *Davis v. Fogle, supra*. In the case last cited, after reviewing the authorities, the court, on page forty-four by Olds, J., said: "These decisions go as far, it would seem, in holding the legal status of the adopted child to be the same as a natural child, as is warranted under the statutes."

As stated in the majority opinion, the common law made no provision for the adoption of children, and at common law the adoption of children was unknown. As to the rights and status of an adopted child, we must therefore look to the statutes, under which the relations of the adopting parent and the adopted child are created. At common law, the right of inheritance was recognized, and it only existed in the line of natural blood. The right of inheritance, therefore, which follows from the relations created by the statute authorizing the adoption of children, is a right in derogation of the common law, and such statutory rights, together with the statutes creating them, must be strictly construed against the person asserting such rights. The law of descent in this State is regulated by statute, and like the common law of inheritance it is based upon natural or blood relationship, as a rule of succession according to nature, which has prevailed for all time. An heir, in legal contemplation, is a creature of common law, while a child by adoption is a creature of statutory law. *Keegan v. Geraghty*, 101 Ill. 26; *Wallace v. Rappleye*, 103 Ill. 229; *In re Jessup's Estate*, 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594.

It has been held, and I think correctly, that an adopted child remains only such, and obtains such right of inheritance only as is prescribed by statute, but yet does not become

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the child in fact of the persons adopting it. In *Barnhizer v. Ferrell*, 47 Ind. 335, this language is used: "By the act of adoption, the child is entitled to inherit from his adopted parent as his heir, in the degree of a child. *Barnes v. Allen*, 25 Ind. 222, 226. The act does not provide that he should be the child of the adopting parent, but he shall take the name, and be entitled to take his property by descent or otherwise the same as he would if he was his child or natural heir, and the adopting parent shall occupy the position toward the child of a father or mother and be liable in every way for such. In *Schafer v. Eneu*, 54 Pa. St. 304, it is said: "The right to inherit from the adopting parent is made complete, but the identity of the child is not changed. One adopted has the rights of a child without being a child." And in *Commonwealth v. Nancrede*, 32 Pa. St. 389, the same court said: "Giving an adopted son a right to inherit, does not make him a son in fact. And he is so regarded in law, only to give the right to inherit." So it is seen that by the act of adoption, the identity of the child is not changed; it does not become the child of the adopting parent in fact, and can be regarded as such only to give the right to inherit. This right of inheritance also is a statutory right, and cannot be enlarged by intendment. See, also, *Russell v. Russell*, 84 Ala. 48, 3 South. 900; *Schafer v. Eneu*, 54 Pa. St. 304; *Barnes v. Allen*, *supra*.

In Vol. 24 Am. & Eng. Ency. of Law 424, referring to statutory enactments for the adoption of children, it is said: "The general effect of these statutes is that the adopted child becomes entitled to succeed to the estate of the adopting parent in the same manner as if it had been a child of the blood of such parent. * * * And, indeed, the general effect of the decisions is to deny the right of the adopted child to succeed to the estate of any member of the adopting family other than the adopting parents. So, it has been held that an adopted child does not succeed to the estate of the adopting parent's ancestors, nor to the estate of children

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born to the adopting parents. See *Sunderland's Estate*, 60 Iowa 732, 13 N. W. 655; *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521; *Keegan v. Geraghty*, *supra*; *Davis v. Fogle*, *supra*; *Helms v. Elliott*, 39 Tenn. 446, 14 S. W. 930; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729.

Children born to the adopting parents do not become brothers or sisters, as the case may be, to the adopted child, and neither can the one inherit from the other. While a child acquires certain additional rights because of the adoption under a statute, there is nothing in the act of adoption which takes away existing rights, and, on becoming entitled to inherit from its adopting parents, the adopted child does not thereby lose its right to inherit from its natural parents. Vol. 24 Am. & Eng. Ency. of Law, 425; *Wagner v. Varner*, 50 Iowa 532.

It might be profitable to review the statutory provisions of some of the states relating to the adoption of children in comparison to our own statute upon that subject, but time forbids. As was said in *Markover v. Krauss*, 132 Ind. 294, 17 L. R. A. 806: "There is, however, but little, if any, uniformity in the various statutory provisions, and a study of the several statutes, with the constructions given them by the courts, gives us but little light on the point of difficulty." The provisions of our statute, so far as the questions here involved are concerned, are as follows: §837 Burns 1894: That "from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother." And the following section provides: "After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother."

In the several cases of *Barnes v. Allen*, *supra*, *Isenhour v. Isenhour*, 52 Ind. 328, *Keith v. Ault*, 144 Ind. 626,

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Patterson v. Browning, 146 Ind. 160, and *Markover v. Krauss, supra*, all have relation to questions of descent from the adopting parent to the adopted child, and these were the only questions there decided that have any weight and bearing here. None of them have reference to the right of an adopted child to take under the will of the ancestor or ancestors of the adopting parent. The exact question therefore presented by the record in this case has not been before the courts of last resort in this State. At least the most diligent search on my part has failed to find a case where the question has been adjudicated upon by our courts. The case of *Schafer v. Eneu, supra*, is more directly in point here than any cited, or which I have been able to find. There, one Theresa Clark, under the laws of Pennsylvania, adopted three children, as she expressed it in her will, "as my children and heirs, with the view and intent that they shall have all the rights of children and heirs of their adopting parent according to the laws of Pennsylvania, and shall thereby inherit the property and estate devised to me for life, and after my death to my children and their heirs, by the last will and testament of my father, James Eneu, deceased." James Eneu, by his will, devised to George Clark certain premises, reserving a certain annual rent which he devised to Theresa Clark, his daughter, for life, and upon her decease the same was to go to her children and the heirs of her children forever, and gave the residue of his estate to his children, naming them. Theresa Clark died without having children born to her. In discussing the case presented by these facts, the court said: "If therefore the adopted children are the owners of the rent, it is because they are devisees under the will of James Eneu, the first testator. But his gift of the remainder was to the children of his daughter Theresa Clark, and the heirs of her children. Adopted children are not children of the person by whom they have been adopted, and the act of Assembly does not attempt the impossibility of making them such. It enacts that it is lawful for any per-

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son desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to a court" etc., "declaring such desire, and that he or she will perform all the duties of a parent to such child," "and such court," etc., "may decree that such child is heir of such adopting parent." There is a proviso enacting that if such adopting parent shall have other children, the adopted child shall share the inheritance as one of them in case of intestacy, and that he, she, or they shall inherit respectively from and through each other, as if all had been the lawful children of the same parent. The right to inherit from the adopting parent is made complete, but the identity of the child is not changed. One adopted has the rights of a child without being a child. In *Commonwealth v. Nancrede*, 32 Pa. St. 389, it was ruled that property descending to an adopted child is subject to the collateral inheritance tax. That could not be if the adopted were a child. In Nancrede's case, Lowrie, C. J., said: "Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit." From the opinion in the case from which we have just quoted, it appears that the will of James Eneu took effect in 1851. It gave a life estate in the rent to Mrs. Clark with a contingent remainder to her children, and the residue of his estate to his children, naming them, in fee.

It is true, as shown in the prevailing opinion, that in *Sewall v. Roberts*, 115 Mass. 262, a rule of construction was announced directly opposite to that announced in *Schafer v. Eneu*, *supra*. An examination of that case, however, discloses the fact that the statutory provision in Massachusetts regulating the adoption of children is much broader, and confers additional rights upon an adopted child, which are not given either by the statute in Pennsylvania or this State. The Massachusetts statute declares that an adopted child "shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the

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natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." Under this broad and comprehensive provision of the statute, it was held that where a deed of trust was made without reserving any power of revocation, and the deed provided that the income from the estate was to be paid to the grantee for life, and upon his death to transfer the principal sum to his executor in trust for the especial use and benefit of any child or children of the grantee, and when afterwards such grantee adopted a child under the statute, and died, leaving no other child, that such adopted child took the estate as a "child", under the settlement as one of the "legal consequences and incidents of the natural relation of parents and children," by virtue of the statute. In upholding the claim of the adopted child, the court said: "This language is very broad and comprehensive, and it was manifestly the intention of the legislature to provide that, with the exceptions named, the adopted child should, in the words of the sixth section, 'to all legal intents and purposes be the child of the petitioner.' The adopted child, in this case, * * * must be regarded in the light of a child born in lawful wedlock." After the decision in *Sewall v. Roberts, supra*, the legislature amended the statute. Pub. Stat. Ch. 148, §§7 and 8. The statute provided that as to succession or inheritance of property, an adopted child "shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him." The following section provides: "The term child, or its equivalent, in a grant, trust-settlement, entail, devise, or bequest, shall be held to include a child adopted by the settler, grantor, or testator, unless the contrary plainly appears by the terms of the instrument; but when the settler, grantor, or testator is not himself the adopting parent, the

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child by adoption shall not have, under such an instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settler, grantor, or testator to include an adopted child."

It seems clear to me that the subsequent amendment of the statute was made by the legislature because it had been demonstrated by the construction placed upon it in *Sewall v. Roberts, supra*, that it was too broad and comprehensive and conferred rights upon adopted children that the legislature did not intend to confer, and the amendment was made to avoid the consequent evil which might result therefrom. While the decision in that case declared the law, as applied to the particular facts and the statute as it then existed, yet, in my judgment, the rule there announced is not binding here, and is not authority. In a later case, after the statute was amended, the last cited statute and the *Sewall v. Roberts* case were under consideration, and the court said: "These provisions made a material change in the law as to the rights of adopted children, and therefore the decision of *Sewall v. Roberts*, 115 Mass. 262, does not aid us in the present inquiry." *Wyeth v. Stone*, 144 Mass. 441. While this case does not decide the question at issue, the reasoning of the court in discussing the facts is so forcible and able that it is worthy of some space in this opinion. The facts, as fairly stated by counsel for appellee, are as follows: In this case one Jaiel Baker died in 1873, leaving a widow and no children except an adopted daughter, Eliza Stone. By his will he left all his property to a trustee who was directed to pay all the income to his wife during her life, and by the second clause of his will he gave, at the death of his wife, certain pecuniary legacies to her nephews and nieces. The third clause of the will is as follows: "After payment of the foregoing legacies, I give, bequeath and devise all the remainder of my estate to my adopted daughter, Eliza Stone, wife of Howard Stone, of said Waltham, in her own right; but if

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said Eliza Stone shall die without issue, before the decease of my said wife, then I give, bequeath and devise said remainder to the heirs at law of my said wife." Eliza Stone, the adopted daughter, died without issue in May, 1877. The wife of the testator died in 1883. She had no natural children, but in September, 1877, she adopted the tenant residing on her land. The court held that such adopted son of the above mentioned wife adopted after the testator's death was not entitled to take under the terms "heirs at law", used in said third clause. The court in construing said will and the above sections of the Massachusetts statutes says: "The design of the legislature in this statute clearly was to qualify and limit the right of an adopted child under the previous statute, as construed by the court. The purpose of the statute seems to be to make a distinction between property which the adopting parent owns and can dispose of by will, and other property or rights which a child born in wedlock can take derivatively through or by reason of his kinship to his parent. Thus, in the seventh section, an adopted child will take by succession or inheritance the same share of the property which the parent owns, so that he can dispose of it by his will as if he were a child born in wedlock; but he cannot take property not owned by the parent, but which would come to a child born in wedlock by right of representation after the parent's death. He can inherit directly from the parent, but he can not inherit in lieu of his parent by right of representation from any of his parent's kindred. The purpose of the eighth section is to provide for cases where property comes to a man's children, not by inheritance, but under a settlement, trust deed, or will, and to establish a rule governing the rights of adopted children in such cases. There is no word which is exactly the equivalent of 'child', so as to be interchangeable with it under all conditions. We think the intention was to provide, that if, by settlement, deed, or will, property is given by terms which embrace and include a child born

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in wedlock, and which, in their application to existing facts, have the same effect and mean the same thing as child or children such as the term 'issue,' 'descendant', or 'heir at law,' the rule provided by this section shall apply in the construction of the instrument. Any other construction would give the statute a very narrow scope, and to a great extent, defeat its purposes. In the case at bar, the property is devised to 'the heirs at law of my said wife.' The tenant is not the natural heir at law of Mrs. Baker. The statutes do not give him all the qualities and rights of an heir at law, but only certain limited rights. * * * The will shows that the testator had in his mind the natural heirs of his wife, as he gives to most of them pecuniary legacies describing them as 'my nephews and nieces.' There is nothing to show that he contemplated that his wife might, after his death, adopt a child; and it is impossible to say that, in the words of the statutes, it plainly appears to have been the intention of the testator to include in his devise an adopted child of his wife."

The case of *Keegan v. Geraghty*, 101 Ill. 26, is instructive as to the relations between an adopted child and the adopting parent. The question at issue in that case was one of descent under the statute of Illinois, as to the right of an adopted child to inherit from children by birth of the adopting parent, and illustrates with what strictness such statutes will be construed as against the adopted child. In the opinion, the court said: "But a majority of the states of the Union have enacted statutes of adoption. There is not uniformity in such statutes. In no two of them, perhaps, are the new rights and obligations precisely the same. * * * Our statute of adoption provides that the child adopted shall be deemed, for the purpose of inheritance by such child, the child of the parents by adoption, etc. 'For the purpose of inheritance of such child,' from whom? The statute does not say, but we say, from the adoptive parents. We think it must be so limited from the nature of the proceeding, the

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propriety of so doing, and from the absence of express words of further extent. The proceeding of adoption is one entirely between such parents and the child, at the instance, by the consent, and upon the petition of the parents or parent. The artificial relation from adoption is established between these parties, and the statute defines what shall be the duties and rights of the parties from this relation between them. As we construe the statute, as between the parties to the transaction the adopted child is deemed, for the purpose of inheritance from the adoptive parents, their child, the same as if he had been born to them in lawful wedlock. And when such an adoptive parent dies intestate, having no children born to him in wedlock, it is reasonable and just that the property he leaves should go to a stranger to his blood, his adopted child. It would be a consequence of his own desire and request in the taking of the adoption proceeding. But another person, who has never been a party to any adoption proceeding, who has never desired or requested to have such artificial relation established as to himself, why should his property be subjected to such an unnatural course of descent? To have it turned away upon his death from blood relations, where it would be the natural desire to have property go, and pass into the hands of an alien in blood,—to produce such effect, it seems to us, the language of the statutes should be most clear and unmistakable, leaving no room for any question whatever. We find in our statute of adoption no express language giving to the adopted child the right to inherit from any one else than the adoptive parents. By the statute the adopted child is to be deemed the same as if born in lawful wedlock, for the purpose of inheritance by such child, ‘and the legal consequences and incidents of the natural relation of parents and children.’ These last general words, we think, are to be qualified in like manner as the others remarked upon, by restriction to the parties to the adoption proceeding and the persons named in the statute. Surely, in this generality of

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language there can not be found given the important right to inherit from a person other than the adoptive parents."

Appellant has cited many cases involving the right of an adopted child to inherit from its adopting parent. The rule fixed by the decisions in those cases, I most heartily concede, and cheerfully accept as the law; but such cases do not throw any light upon the question here presented. In the prevailing opinion, many of those cases are cited and commented upon, and as they are not of controlling importance here, I do not deem it necessary to refer to them or to discuss them at any length. There is one case, however, I desire to mention, *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. 196. The question at issue there was one of descent from the adopting parent to the adopted child. Following the decision in that case, as reported in the last cited report, is the following note: "Very often, in wills, property is devised to a specified person, and, after his death, to his heirs or next of kin, or to his heirs at law, and then in the event of his having an adopted child, the question is, whether such child is included within these words, and therefore entitled to the benefit of the devise or bequest. In the absence of circumstances tending to show that the testator anticipated the adoption, or knew that it had already taken place, and therefore probably intended to treat the person adopted as a possible beneficiary, the decisions generally exclude the adopted child from the benefit of the will." *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557; *Morrison v. Sessions*, 70 Mich. 297, 38 N. W. 249, 14 Am. St. 500; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288; *Schafer v. Eneu*, 54 Pa. St. 304; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729. In *Jenkins v. Jenkins*, *supra*, it was said: "If the adopted child, not being an heir, can by statute be created one for the purpose of inheritance, such a statute can not be used to defeat the manifest intention of the testator, which is controlling in the construction of wills." In many cases it is correctly held that

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greater regard is had to the clear intent of the testator in the construction of a will, than to the particular words used in seeking to identify the persons intended as beneficiaries. *McLeod v. McDonnell*, 6 Ala. 236; *Travis v. Morrison*, 28 Ala. 494; *Bond's Appeal*, 31 Conn. 183; *Stevenson v. Druley*, 4 Ind. 519; *Ely v. Ely*, 20 N. J. Eq. 43. If a will is capable of two interpretations, that one should be adopted by the courts which gives preference to blood relatives, rather than strangers. 4 Kent. Com. (11th ed.), 535; *VanKleeck v. Dutch Church*, 20 Wend. 457; *Scott v. Guernsey*, 48 N. Y. 106; *Quinn v. Hardenbrook*, 54 N. Y. 83, 86; *Kelso v. Lorillard*, 85 N. Y. 177; *Wood v. Mitcham*, 92 N. Y. 375, 379; *Downing v. Bain*, 24 Ga. 372; *Smith's Appeal*, 23 Pa. St. 9. In many cases it has been held that where the words "issue" or "children" or "heirs at law" have been used in a will, a child adopted after the execution of the will could not take under such words. *Jenkins v. Jenkins*, *supra*; *Russell v. Russel*, 84 Ala. 48, 3 South. 900; *Barnum v. Barnum*, 42 Md. 251; *Schafer v. Eneu*, *supra*; *Bowdlear v. Bowdlear*, 112 Mass. 184; *Wyeth v. Stone*, *supra*. I find very many cases which hold that the word "children", being confined to issue in the first degree, when used in a deed or will, applies primarily to a specific and determinable class; and that the term is a *designatio personae* and indicates not inheritable succession, but individual acquisition. The word "child" is a word of limitation. For authorities see following note 1, page 232 Vol. 3 Am. & Eng. Ency. of Law. In Anderson's Law Dict. p. 174, the word "child" is defined as follows: "3. A legitimate descendant in the first degree." In common parlance, and as generally used and understood, the word "children" does not include any other than the immediate descendants in the first degree of the ancestor. It may, however, include others, as where it appears from a will that there are no other persons in existence who will answer the description of children except descendants of a degree remoter than the first; or where there could not be

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any of the first degree at the time or in the event contemplated by the testator; or where he has shown by other words that he used the word "children" as synonymous with descendants, or issue, or to designate or include illegitimate offspring, etc. Of the many cases in support of this definition, I cite these: *Mowatt v. Carow*, 7 Paige 328; *Palmer v. Horn*, 84 N. Y. 516; *Ingraham v. Meade*, 3 Wall, Jr., 32; *Rogers v. Weller*, 5 Biss. 166; *Feit v. Vannatta*, 21 N. J. Eq. 84; *Bates v. Dewson*, 128 Mass. 334. Mr. Jarman on Wills (R. & T.), Vol. 2, 690, says: "The legal construction of the word children accords with its popular signification, namely, as designating the immediate offspring; for, in all cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue." In Vol. 2, Redfield on Wills (2nd. ed.), p. 15, it is said: "The word 'children' as well as all other similar descriptive terms of classes or relations, it will be borne in mind, must always be understood in wills, in its primary and simple signification, where that can be done." Mr. Schouler on Wills, §534, says: "By 'children,' whether of the testator or some other person, a will is generally understood to denote all of the blood offspring, whether by one marriage or more. But children by affinity, such as a son's widow, are *prima facie* excluded; and so are step-children." The interpretation put upon the word "children" by these great authors, and as construed by the courts in the many cases cited, and others, ought to be sufficient to determine the status of the appellant in this case, without looking further to the will in determining the intention of the testator, and who was embraced in the will as objects of his bounty. This technical meaning has long been given to the word in the construction and interpretation of wills. In construing a will and in interpreting the words used therein, we must presume that the testator fully understood the meaning of the words used by him, and that he used them in their simple, primary and usual meaning. Hence in the use of the word

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"children" in item twelve of the will under review, we must presume that he used it in its primary and simple signification, and that he intended it to embrace his immediate offspring and the immediate offspring in succession. The Supreme Court of this State has recently put a construction upon the word "child" or "children" as follows: "It is a rule of construction that *prima facie*, the word child or children, when used either in a statute or will, means legitimate child or children." *McDonald v. Pittsburgh, etc., R. Co.*, 144 Ind. 459, 32 L. R. A. 309. In that case many authorities were collected and cited in support of the rule announced, and I content myself by referring to them there. True, an adopted child, within the meaning of the statute, is a "legitimate child" of its adopting parent, but the words "legitimate child", as used by law writers and in the adjudicated case, means, unless otherwise designated, children born in lawful wedlock. Counsel for appellees have cited the case of the *New York Life Ins. Co. v. Viele*, 22 Hun App. Div. 80, 47 N. Y. Supp. 841, and put much reliance upon the decision to support their contention here that the word "children", as used in item twelve of the will, does not embrace appellant. In the prevailing opinion that case is referred to and the facts upon which it rested are fairly stated, but the learned judge who wrote the prevailing opinion says that the case is not in point. I concede that the case and the one now under consideration are strongly different in point of facts, but the principles discussed, and the reasoning used, do in my judgment lend support to the position of appellees. I need not here state or refer to the facts in that case, but I deem it of importance to make some quotations from it. The court said: "At the time of the execution of the will, the testatrix's daughter, Emily, was then but forty years of age, and it cannot be said that there was no possibility of her having any children in the future. There is nothing in the will itself, or in the situation of the parties at the time of the

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execution of the will, that would justify the court in assuming that this testatrix intended to give to the words 'living lawful issue' any other meaning, viz.: That of children or their descendants, and nothing from which an inference could be drawn, that the testatrix intended to include within the class thus specified any person but the actual offspring of her daughter or their descendants. It is true that at the time of the execution of the will, Mrs. Lengnick and her husband had adopted this child, and that by that adoption, under the law of Saxony, the child had acquired a certain legal status, with certain defined legal rights; but such an adoption did not by the law of Saxony give to such child all the rights of a child born of the body of the persons who had adopted her; nor would she be included within the legal definition of the term 'lawful issue.' The court in construing this statute say: 'The relation here provided for is that between the adopted child and the adopting party; that relationship is reciprocal. The duty of the adopting party is that of a parent, and the duty of the adopted child toward the adopting party is that of a child of a marriage of its parents. This section gives to the child no right as to other not adopting parties; and where the code speaks of the right of an adopted child to inherit, it is provided that adopted children inherit from the adopting party the same as children of the marriage, unless otherwise provided in the contract of adoption.' Thus, no right is given to an adopted child by the code to inherit from others than the parties who have adopted the child. This limitation would seem to have important bearing. Thus, persons adopting a child could assume a relationship to the adopted child, and by their voluntary act such adopted child acquires a right to inherit their property; but it would be a much more extensive right to bestow upon an adopted child the right not only to inherit from the adopting parties property which belonged to them, but also the right to inherit property belonging to the family of the adopting parties, who had no voice in the adoption of

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the child, and thus bring in a person to inherit their property who was not of their blood, and in whom it was possible they had no interest." The court in commenting upon the weight that should be given the provisions of the Saxony code, in reference to the adoption of heirs, in the construction of this will, says: "Here, however, we have to construe, not so much the meaning of the Saxony code as the intention of this testatrix in the making of the will in question. Her intention must be ascertained from the words used in the will, considering the circumstances surrounding the testatrix and the objects of her bounty at the time of the making of the will; and in ascertaining that intention it is, we think, immaterial as to what construction the Saxony court would give to the Saxony code. What we have to do is to ascertain what disposition this testatrix intended should be made of this share of her estate, after the death of her daughter Emily, and considering all the language used in the will, and the surrounding circumstances, we think it is clear that the testatrix did not intend that this share of her estate, given to her daughter Emily, for life, should upon her death, go to this adopted child, rather than to her own grandchildren, for whom she was so particular to make explicit direction as to their ultimately becoming the owners of all her property, upon the condition of her daughter Emily dying without living children. To hold otherwise would result in giving to this adopted child, who was no relative of hers, and upon whom she had not shown any express intention to confer it a much larger portion of her estate than is given to any of her own grandchildren; and we certainly do not think that we would be justified in adopting such a conclusion in the absence of an intention thus declared." It is unnecessary for me to make any comment on what the court said in that case further than to say that it seems to me that the principles there discussed strongly entrench and strengthen the right of appellees to have the residue of their ancestor's estate distributed to them. If

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I properly comprehend the scope of the prevailing opinion, the decision is made to rest upon the fact that by adoption appellant became the child of Mary Walker, and as she survived her adoptive mother, she is entitled to share in the distribution of the residue of the estate, as directed in item twelve of the will, on the ground that the word "children", as there used, is sufficient to designate her as one of the distributees upon the death of her adopted mother.

I have tried to show in this dissenting opinion, and feel that I am abundantly sustained by the great weight of the authorities, that the word "child", as used in the will, does not include the adopted child of a residuary legatee, who is made by the will a distributee under it. I am clearly of the opinion that under all the rules for the construction of wills, appellant can not, by the will itself, be designated or identified as a legatee. It is the rule that words occurring more than once in a will must be presumed to be used in the same sense, unless a contrary intention appears by the context. Thus in Jarman on Wills, in his chapter on general rules of construction, it is said: "That words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appears by the context, unless the words be applied to different subjects." And it was so held in *State Bank v. Ewing*, 17 Ind. 68. On examination of the will in this case, it will be found that the word "children" occurs four times, and only in item twelve. After the several bequests made, preceding item twelve, which disposed of all the testator's estate except an undetermined surplus, he first directs that such surplus shall be distributed among his several children, Martha, Thomas J., John A. and Samuel W., and that they shall share alike in such distribution. Then the will provides that in the event of the death of either of the parties named, the shares due such as are deceased shall go to the children of such deceased person, if there be children, and if there be no such children, then such shares shall go to the survivors. It will

not be denied but what the testator, when he used the word "children" in the first instance, meant the children of his body; children of his blood born to him in lawful wedlock. It seems equally clear to me that when he again used the word "children", he meant to include the children of his children, of the same blood and not otherwise. It also appears to me from the language used, that it was the intention of the testator that no part of his surplus estate should pass from his lawful descendants, for he specifically provides that if there shall be no children of his children, it shall go to the survivors of his own children. As we have seen, words employed in a will must be given their ordinary meaning, unless there is language in the will which indicates clearly that the testator did not use the words in question in their plain and ordinary sense. See *West v. Rossman*, 135 Ind. 278. There is certainly no language in this will which indicates clearly that the testator did not use the word children in its plain and ordinary sense, and according to its common acceptation.

When the will in question is measured by the general principles I have stated and discussed, and which are supported by the authorities, and when we apply to it the rules of construction adhered to by the courts, I do not see how it is possible to construe it as expressed in the prevailing opinion, so that appellant can become a legatee under the provisions of item twelve. To my mind, and according to my judgment, the construction so placed upon it is a forced one, and does violence to the manifest and clear intention of the testator. John Miles had accumulated a comfortable fortune, both in real and personal property. He had raised a family of four children, who had grown to manhood and womanhood. These children had doubtless labored for him and by their labor materially aided him in amassing his fortune. By his will, he disposed of all his property. Throughout the entire instrument, the fact that the particular, special and, with two exceptions, the full and whole

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subjects of his bounty were his wife and children of his body clearly appears. He made a bequest of \$1,000 to his son-in-law, and one of \$100 to one Oscar Stierwalt, and with these exceptions it seems to me that he intended that all the rest of his property should vest in his own children after the death of his wife and invalid daughters. His daughter Martha was twenty-nine years old when she was married. When the will was made, she was forty-two years old and had not had born to her any children. She had almost reached the usual age when a woman ceases to bear children. The probabilities are that she never would have borne a child, and I have no doubt but what her father, when he made his will, had that fact in mind. Why did he give to his three sons valuable real estate in fee and to his daughter Martha only a life estate in real estate? The answer is plain. She was childless, and likely to be childless, and his object was to dispose of his real estate and other property so that it would not pass from his lineal descendants. If he had given to her real estate in fee simple, and she died without issue, such real estate would not have gone from his lineal descendants, unless she had died before her husband. Or if the real estate had been given to her in fee simple, she could have disposed of it by will, and it might thus have passed out of the family. Under that clause of his will giving a life estate to his daughter and son-in-law, he provided that at their death, it should go to his heirs at law. Martha and her husband were even forbidden to sell the timber from the land, for the evident reason that it would depreciate its value, when it should in the contingencies named vest in his heirs at law. But a stronger reason yet remains which shows that it was the intention of John Miles to provide that his entire estate, with exceptions mentioned, should eventually vest in his heirs at law. It is this: If, at the time he executed his will he did not believe his daughter would die childless, why would he give to her only a life estate in real estate, which then was the only property he was certain

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would go to her, thereby preventing her children from inheriting from their mother that which, according to the laws of descent, would be theirs? At that time, he did not know that there would be any surplus of his estate. His entire estate was charged with a sacred trust in the care and maintenance of his wife and invalid daughters. That was declared to be the first object of the will, and it was impossible to know what portion of his estate would be thus consumed. If he had believed his daughter would bear a child, and then provided that the real estate given to her for life should at her death go to his heirs at law, he did a great injustice to the possible issue of her body, which does not harmonize with his generous and bounteous nature as it is written in almost every line of his will. Again appellant was not adopted as the daughter of Martha until nearly two years after the will was executed. It can not be said, with any reason, that he contemplated such adoption. After the adoption, of which fact he had knowledge, ample time elapsed for him to have placed a codicil to his will and made provision for her, if, indeed, he intended that she should be an object of his bounty and affection.

In concluding this dissenting opinion, which has been extended far beyond my first intention, I conclude by again saying that the intention of the testator is to be collected from the whole will together, and the language used is to be construed in reference to and in connection with the circumstances surrounding the testator at the time of the execution. Every will also should be interpreted, as far as possible, from the standpoint apparently occupied by the testator. In addition to the authorities above, I cite the following: Schouler on Wills, §§466, 469; *Smith v. Bell*, 6 Pet. 68; *Blake v. Hawkins*, 95 U. S. 315; *Brown v. Thorndike*, 15 Pick. 388; *Postlethwaite's Appeal*, 68 Pa. St. 477. Taking and construing the will as a whole, interpreting it as far as possible from the standpoint of John Miles, looking at and considering the circumstances surrounding

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him at the time, placing myself as nearly as possible in his situation and condition, and giving the benefit of the doubt, if there is any doubt, as to what his intention was, as expressed in item twelve, and adopting the construction which casts the property where the law would cast it if no will had been made, I am unable to accept the construction given it by my associates, which bestows upon alien blood, an entire stranger, a considerable portion of his surplus estate.

Entertaining, as I do, no doubt respecting the intention of the testator, as plainly, clearly and manifestly expressed in his will, to give in equal portions the residue of his property to his own children, and the children of those who might die, and that it was not his intention to include appellant, who was not known to him, who was of alien blood, an entire stranger, I hold that she has no claim upon his estate as a legatee, or otherwise, and is not entitled to share in its distribution. The judgment should be affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—The learned and forceful brief in support of the petition for a rehearing would seem to exhaust the authorities and reasons to be adduced in support of appellee's view of this cause. While additional citations are given and instructive comment made upon the numerous authorities referred to, it is proper to say that the court by oral argument and able briefs had had urged upon its consideration the reasons for affirming the judgment of the lower court presented in support of the petition for a rehearing. For this reason we do not deem it necessary, however interesting it might be, to consider in detail the same propositions so ably re-discussed. Let it suffice to say that after a review of the authorities and a careful consideration of the reasons set out in the petition, and the briefs in support thereof, we are of the opinion that the decision should stand. Petition overruled.

DISSENTING OPINION.

WILEY, C. J.—Appellees have petitioned for a rehearing and have based the same upon six grounds, viz.: (1) That the court erred in construing the statute of the State concerning the adoption of children; (2) that the court erred in construing the will of John Miles; (3) that the court erred in holding that the word “children”, as used in the will, meant and included the adopted child (appellant) of the testator’s daughter, Martha Walker; (4) that the court erred in that it did not, in the construction of the will, give effect to the intention of the testator, but on the contrary defeated his intention; (5) that the court erred in holding that appellant is a devisee or legatee of the testator, John Miles, and (6) that the court erred in adjudging that the facts specially found entitled appellant to judgment.

The petition for a rehearing is supported by a very able brief, and in view of the fact that the majority of my associates still adhere to the conclusions reached in the prevailing opinion, and hence affirm as the law the several propositions thereby established, I deem it important and proper to make some additional observations upon the very important and interesting questions at issue. I am so thoroughly convinced that the rules announced in the prevailing opinion are in conflict with the law, as established by the great weight of authorities, that I can not let them pass without more fully expressing my views.

In my original dissenting opinion I stated that the construction placed upon the will of John Miles in the majority opinion was so foreign to the manifest intention of the testator, as plainly expressed by his whole will, that violence was thereby done to such intention; and also to hold that under the will appellant was entitled to share in the residue of the estate to which Martha Walker would be entitled, if living, was to hold that it was the manifest intention of the

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testator, from the will itself, to give to her who was alien blood to him, an entire stranger, in fact not in legal existence at the time the will was made, an equal share of his estate. Upon a reëxamination of the authorities, and a careful consideration of the argument, both in the original briefs and the briefs in support of the petition for a rehearing I am more strongly convinced than ever that the authorities will not support the construction given to the will, nor the construction given to the statute, so that the word "children", as used in subdivision twelve, embraced, or was intended to embrace, an adopted child. As to the cardinal rule for the construction of a will, viz., that the intention of the testator must prevail, my associates and myself fully agree. As Judge Redfield says: "The intention of the testator is the polar star." Our point of divergence is in interpreting the will as to what the intention of the testator was in the language used in subdivision twelve taken in connection with the whole will. My contention here is that my associates departed from that rule, so well established, and instead of giving effect and force to the intention of the testator, frustrated and confounded it. By the majority opinion, the clear intention of the testator, as gathered from the entire will, as it seems to me, has been diverted, and a large portion of his estate given to one of alien blood, upon which it was not his intention that his will should operate, or upon whom his bounty should descend. It seems perfectly obvious to me that when we read the twelfth subdivision of the will in connection with and in the light of the whole will, and especially the third item or subdivision, that it was the manifest intention of John Miles to provide for a designated class of persons, who were to be objects of his bounty, and that the class thus provided for was composed of those who were of his own blood. By his will, he was making provision for such class of persons, and it was upon them that his mind was fixed. He did not contemplate making provision for strangers, or aliens, and to construe the will differently is not

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only reading something into the will that is not there, but it is also reading something into the will that the testator had no intention of putting there, or that should be there. As I tried to show in my original dissenting opinion, and think that I did show, the will, as a whole, plainly expresses the intention of the testator, and that intention was to provide for those of his own blood. This fact is made doubly plain and specially clear and certain by the following clause in item three, viz.: At the death of said Martha and Columbus Walker, the lands aforesaid shall descend to my heirs at law." If it was the intention of the testator that a possible adopted child of Martha should share in his estate, why did he not provide that certain real estate should go to her in a certain contingency, as well as that she should share in the residue of his personal estate? It is clear that by the adoption of the appellant by Martha Walker, she (appellant) did not become the heir of Martha Walker's father, though by the adoption she did become her heir. A will should be construed so as to make all of its provisions harmonious and consistent, and so as to carry out the general scheme of its author. A construction which will create inconsistencies is not allowable.

In *Jackson v. Hoover*, 26 Ind. 511, the court quoted approvingly from Jarman on Wills as follows: "That all parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole. Courts will look to the circumstances under which the deviser makes his will, as the state of his property, of his family and the like." In no sense could the heirs of Martha Walker be the heirs of John Miles, unless they were of his blood. When he used the words "my heirs at law", he meant simply what the law implies,—heirs of his own blood. It is only by extending the word "child" far beyond its primary, etymological and legal signification that it can be held that John Miles said by his will, and thereby intended to say, that a child of an entire stranger to him was to him his daughter's child in the sense of being entitled to share in

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his will under subdivision three thereof. She was not the child of the child of the testator within his meaning that she should be one of his beneficiaries. Appellant is not a descendant of the father of Martha Walker, for she is not of his blood, but is of the blood of strangers. And not being a descendant, she can not, as to him, be a child of his daughter, within any reasonable or legitimate meaning of the word "child" or "children". Again, by reference to item two of the will, which I need not here repeat, as the will appears in full in my former opinion, it will be seen that its provisions further exhibit and make plain the intention that was foremost and dominant in the mind of the testator in the execution of his will only to make provision for those of his own blood and to whom he was united by natural affection. I assert without fear of successful contradiction that there is not a single clause, word, or sentence in the whole will that even indicates a remote intention on the part of John Miles to bestow any part of his estate upon any one, except those of his own blood, unless it be the use of the word "children" in item twelve. On the contrary, every word, clause, and sentence in the will, and the circumstances and conditions that surrounded him when it was executed, point with unerring certainty to the fact that his intention was to bestow his entire estate in just and equitable proportions, only upon those of his own blood. Nor do I concede that the word "children", as used in item twelve, and as meant by him, as shown by the entire will, included or was intended to include any one else. Why would he make a liberal provision for appellant, who was an entire stranger to him; who was not in legal existence, and who could not have been in his mind? Can a person intend to include one in his will who does not exist, except when its provisions are broad enough to embrace one subsequently and legitimately born, to which such provisions would apply and upon whom they would operate? Can a person by his will intend to bestow a bounty upon a person who is a stranger to him, and

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who is not in his mind when such will is executed? If my learned associates will satisfactorily answer these inquiries within the light of the will of John Miles, and all the authorities, then I will yield the point and believe what now seems to be impossible. The very word "intention" itself is conclusive, it seems to me, that in the majority opinion the intention of the testator has not been carried out, but on the contrary perverted. The meaning of the word as defined by lexicographers is plain and unequivocal. In defining the word, Webster says: "A stretching or bending of the mind toward an object; closeness of application; fixedness of attention." Again: "A determination to act in a certain way, or to do a certain thing; design." And again: "The object toward which the thoughts are directed; end; aim." Mr. Locke says: "Intention is when the mind, with great earnestness, and of choice fixes its view on any idea." Locke on Human Understanding, 11, xix 1. As defined in the Century Dictionary, p. 3136, intention is "that which is intended, purposed or meant; that for which a thing is made, designed or done."

Taking the meaning of the word as thus defined, how is it possible, within the light of the authorities, to single out the word "children" in item twelve, and conclude that appellant was one toward which the testator's mind was directed; or that with great earnestness, and of choice, his mind fixed its view on appellant, when he executed his will? Yet this must be done before appellant can be included in the word thus used. Such reasoning is seems to me is paradoxical. To go entirely outside of the meaning of the word "children", and against the unmistakable evidence of the intention of the testator, as expressed by the general terms and provisions of his will, it appears to me that there is neither reason nor legal precedent by which the court can single out a detached and isolated word, or provision, and by that declare that because the testator used the word "children" he meant to go outside of the class of persons he uni-

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formly embraced in all the other provisions of his will, and thereby include and place upon an equality with such class, who were all of his own blood, a person who was without kinship, and the offspring of strangers. If I have a fair conception of the law relative to the construction of wills, the construction which my associates have given to the will under consideration is indefensible.

In *Edgerly v. Barker*, 66 N. H. 434, 28 L. R. A. 328, the court on page 449 used the following language: "Correct construction is not insured by correct views of the law. A testator's right to use the words in the sense in which they are commonly understood may be infringed when that sense is not known to his judicial interpreters, or is disparaged by their educational bias. The professional and official sense sometimes introduced by construction is in effect a scholastic dialect not used by the mass of the people." As I showed in my former opinion, the intention of the testator, as gathered from the will itself, when the will is read in the light of the circumstances and environments at the time of its execution, is in the last analysis and in every instance the objective point of judicial inquiry. The law will not deny to the reader of an instrument the same light that the writer had. In view of this rule, the inquiry naturally suggests itself, what did the word "children" mean to John Miles, when he signed the will? I have no doubt, in the light of the whole will, and the circumstances and environments that surrounded him, that it meant to him just what the ordinary man understands it to mean, and, as used by him, it meant the natural offspring of his children. It certainly did not mean to him artificial children. We can not presume that he employed the word in any technical or professional sense. There is an expression in the Bible to the effect that the sins of the father shall be visited upon the "children's children to the third and fourth generations." If we construe the word in the light of the prevailing opinion, then the sins of John Miles are to be visited upon the adopted child

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of his daughter and upon her children's children. The clause of the will that has given rise to the contention here is itself explanatory of what the intention of the testator was. It is: "And in the event of the death of any of the last above named [meaning Thomas, John, and Samuel Miles, and Martha Walker, his only sons and daughter], the shares due such as may be deceased shall go to the children of such deceased person, if there be children, and if there be no children then such share shall go to the survivors." The words which precede those I have just quoted show a distinct and emphatic purpose of the testator to keep his property in the line of his own blood. Without extended comment, I refer to some authorities to show that the word "children" means natural offspring. Jarman on Wills, Vol. 2, p. 690; 2 Redfield on Wills, p. 15. In Williams on Executors, Vol. 2, p. 362, in a note, it is said: "Neither does the word 'children' embrace a child adopted under a statute providing for such adoption." See, also, *Russell v. Russell*, 84 Ala. 48, 3 South. 900. Neither are stepchildren included in the word children. *Barnes v. Greenzebach*, 1 Edw. Chan. 41. Beach on Wills, §279, says: "A gift to children, if there be children in existence, does not include grandchildren nor stepchildren nor adopted children." See, also, *Douglas v. James*, 66 Vt. 21, 28 Atl. 319, where it is said: "We recognize the rule that in construing wills, the word 'children' is deemed to have been used in its popular sense, that is, as signifying descendants of the first degree." In *Ward v. Cooper*, 69 Miss. 789, 13 South. 827, a devise was made "to the children of my sister." The court said: "Only the immediate offspring of Barthenia Guinn were entitled to take under the will, since the gift is to 'children', and a broader than the primary signification of the word is not given to it by the will." Her children were the class designated to take by the will. Also, see, *Wylie v. Lockwood*, 86 N. Y. 291, to the same effect. *Cummings v. Plummer*, 94 Ind. 403, 48 Am. Rep. 167, which I cited in my former

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opinion, is directly in point. While many additional authorities in line with the above, and in harmony with those cited before, might be cited, it seems unnecessary to do so.

When we consider the meaning of the word "children" to be natural offspring, as fixed by law writers and judges of great learning, and as used by the sages of the law for centuries, it does not appear to me that when John Miles, who was ignorant of the law and unversed in its technicalities, but who used the word as he understood it, and in its primary, usual, and ordinary sense, such meaning as he gave it should be allowed to stand, and that his intention, as expressed by his will, ought not to be subverted by a forced and technical construction.

Appellees' reasons for a rehearing are, in my judgment, well taken, and the petition should be granted.

PERKINS WINDMILL AND AX CO. v. YEOMAN.

[No. 2,934. Filed December 12, 1899.]

PLEADING.—Contract.—When Not Alleged to be in Writing.—Where a contract upon which an answer is based is not alleged to be in writing the answer will be treated as founded upon an oral contract. *p. 484.*

SAME.—Contract.—Variance.—Where a defense is based upon a contract not in writing, and the contract appears upon the trial to be a written one, the defense must fail. *p. 485.*

From the Knox Circuit Court. *Reversed.*

W. H. DeWolf, for appellant.

O. H. Cobb, for appellee.

BLACK, J.—This was an action upon a promissory note brought by the appellant, the payee, against the appellee, the maker. There was an answer in three paragraphs, the first being a general denial, and a reply in general denial was addressed to the second and third paragraphs. No question was made as to the sufficiency of any of the plead-

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ings. The trial resulted in a finding for the appellee. The appellant's motion for a new trial was overruled. The evidence was not sufficient, unless it can be said that it sustained the third paragraph of answer. That paragraph alleged that the appellant agreed with the appellee to sell to the latter a certain windmill and properly to erect it upon the appellee's premises, for a certain sum, being the sum specified as principal in the note, and that the note was given therefor; that at the time of said agreement the appellant agreed with and guaranteed to the appellee that it would so construct and erect said windmill that it would run smoothly, and draw or pump water from the well at which it was to be erected to a height of at least four feet above the surface of the ground at that place, and that it would pump water to the quantity, on an average, of ten barrels per day. The erection of the windmill was alleged, and it was averred that it was so erected and constructed that it would not run smoothly and would not draw or elevate water to the height agreed upon, in the quantity agreed upon, and would not draw or elevate more than three or four gallons of water per day, upon an average. Notice to the appellant of such failures, and demand for the performance of the agreement, and failure of the appellant to cause the windmill to run smoothly, or to draw water as agreed upon, were formally alleged, and it was averred that the windmill was of no value to the appellee, and that he had held it since such notice, and still held it, subject to the order of the appellant.

The contract upon the breach of which the defense proceeded not being alleged to be in writing, the answer is to be treated as founded upon an oral contract. See *Harrod v. State, ex rel.* (Ind App.), 55 N. E. 242. On the trial, upon the examination of the appellee as a witness, it appeared from his testimony that the agent who sold the windmill gave the appellee what the witness called "a guaranty in writing." The witness said he did not know where this in-

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strument was at the time of the trial, and that he could not relate what was in it; that the agent and the appellee began their negotiations in the fall of 1894; that the guaranty was given to the appellee in January or February, 1895; that the note was given in June, 1895; that the mill was put up in September, 1895; and that after the paper was given to the appellee nothing further was said about the contract.

Of course, all prior oral negotiations must be regarded as merged in the written contract.

When an action or a defense is based upon a contract not in writing, and the contract appears upon the trial to be a written one, the action or defense must fail. *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 226, and cases cited.

The judgment is reversed, and the cause is remanded, with instruction to sustain the appellant's motion for a new trial.

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[No. 2,952. Filed December 12, 1899.]

EVIDENCE.—Admissions in Pleadings Filed in Another Action.—

Admissions made by defendant in the pleadings filed in another action cannot be proved by parol, since the record is the best evidence. *p. 488.*

SAME.—Writings.—Intention.—It is error to permit a party to testify as to what his intention was in delivering a letter. *pp. 488, 489.*

HARMLESS ERROR.—Admission of Evidence.—Intention of Party in Delivery of a Letter.—Error in permitting a party to testify as to what his intention was in delivering a letter is harmless, where the testimony did not tend to change the plain meaning of the words used in the letter. *p. 489.*

From the Clark Circuit Court. *Affirmed.*

A. C. Harris and Frank Cutter, for appellant.

M. Z. Stannard, for appellee.

HENLEY, J.—This cause is here for the second time. The opinion upon the former appeal is found in 17 Ind. App.

96. Upon the former appeal the judgment of the lower court was reversed, on account of the insufficiency of the complaint. Appellant filed an amended complaint in two paragraphs; appellee answered the general denial. The cause was submitted to the court for trial, and upon the request of appellant the court made a special finding of facts and stated its conclusions of law thereon. The special finding is a complete statement of the facts and was, in substance, as follows: In the years 1893 and 1894, the appellant, Abram R. Colborn, was engaged in the wholesale lumber business at Michigan City, Indiana, under the name and style of A. R. Colborn & Company. In the month of June, 1892, the company known as "M. A. Sweeney Company" was incorporated, and during the year 1894, M. A. Sweeney was the president, James W. Sweeney the secretary, and appellee, Jacob R. Fry, the treasurer of said company. In the year 1894 the appellee, Fry, was engaged in the retail lumber business at Jeffersonville, Indiana, and had been so engaged for a number of years prior thereto, his place of business being a half mile distant from the place of business of the M. A. Sweeney Company, and there was no connection whatever between the business of appellee and said company. That, prior to the time the letter hereinafter referred to was written, appellee had frequently purchased bills of lumber from appellant, which had at all times been delivered to appellee at his place of business; and that prior to said time the said M. A. Sweeney Company had also purchased lumber from appellant, which lumber at all times had been delivered to said company at its place of business. On the 16th of March, 1894, the said M. A. Sweeney Company was engaged in constructing steamboats for the United States government, in which it was necessary to use the lumber afterwards purchased of appellant; and on said last named date, the said M. A. Sweeney, when about to leave Jeffersonville for Michigan City, to purchase lumber to be used by the M. A. Sweeney Company in building boats, informed

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appellee of the proposed trip, whereupon appellee informed said Sweeney that he, appellee desired to purchase certain lines of lumber, consisting of doors and sash, and requested said Sweeney to make such purchases for him, and cause the same to be shipped to appellee at his place of business in Jeffersonville, Indiana. That, concurrently with such request, appellee wrote, signed, and delivered to said Sweeney the following instrument: "Jeffersonville, Ind., Mch. 16, 1894. To whom it may concern: The bearer, M. A. Sweeney, is authorized to purchase such lumber as he may select for me. Respectfully, J. S. Fry." That within a day or two after the 16th of March, 1894, the said M. A. Sweeney visited appellant's place of business at Michigan City, Indiana, and presented to appellant the instrument of writing above set out, but did not purchase any doors, sash, or other lines of lumber for appellee, because appellant did not have in stock the kind of lumber required by appellee. That while at appellant's place of business said M. A. Sweeney purchased from appellant for the M. A. Sweeney Company the bill of lumber mentioned in the complaint, amounting to \$1,769.17, and he instructed the appellant to ship the same to the M. A. Sweeney Company, at Jeffersonville, Indiana. That before making such purchase, the said M. A. Sweeney informed appellant that said lumber was purchased for the M. A. Sweeney Company, and the purpose for which it was being purchased, and said order was entered upon appellant's books in the name of the M. A. Sweeney Company, and the lumber so purchased was charged to, consigned, shipped, and delivered to said M. A. Sweeney Company, at Jeffersonville, Indiana, and no part thereof was ever delivered to this appellee. That said order was entered upon appellant's books in March, 1894, and shipped during the months of March, April, and May of said year. That the first notice appellee received that appellant would look to him for the payment of said bill of lumber was some time during the month of August, 1894. That after the

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purchase of said lumber, the said M. A. Sweeney Company made payments and was allowed credit on said bill to the amount of \$259.72, leaving a balance due thereon of \$1,509.-45. That the said sum of \$1,509.45 is due appellant from the M. A. Sweeney Company. That the M. A. Sweeney Company is insolvent. That appellee has never assumed to pay any part of said bill. That no part of the lumber so shipped by appellant was delivered to or became the property of appellee. Upon the facts so found, the court stated the law to be that the sale of the said bill of lumber was a sale from appellant to the M. A. Sweeney Company; that appellee had not become liable to appellant for any part of said bill of lumber; that the instrument of writing executed by appellee, and delivered to M. A. Sweeney, is not a contract of guaranty, and that appellee is not bound to appellant thereon.

Appellant excepted to the conclusions of law, the court overruled his motion for a new trial, and granted an appeal to this court. The errors assigned are that the lower court erred in its conclusions of law, and that the court erred in overruling the motion for a new trial.

It is argued that the finding is not sustained by sufficient evidence. A careful reading of the evidence discloses the fact that the statements of the principals in this cause were decidedly conflicting. The conflict is upon the material questions. This court does not weigh evidence. Upon the facts found, the conclusions of law stated by the court were correct. Appellant offered to prove certain admissions made by appellee as to his liability to appellant for the bill of lumber so sent. These supposed admissions were made in the pleadings filed in another action commenced by appellee against the M. A. Sweeney Company. The lower court correctly excluded the evidence. The record itself was the best evidence by which to prove its contents.

The appellee, upon his original examination, was also permitted to answer the question, over appellant's objection, as

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to what his intention was when he delivered the "letter" to M. A. Sweeney. In allowing appellee so to testify the lower court committed an error. *Free v. Meikel*, 39 Ind. 318; *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *Dillon v. Anderson*, 43 N. Y. 236; *Sourse v. Marshall*, 23 Ind. 194; Clark on Contracts, p. 5.

Appellee testified as follows as to his intention when he delivered the letter to M. A. Sweeney: "I had no thought or intention of binding myself for lumber to be purchased by the M. A. Sweeney Company at the time I wrote the letter sued on. It was only written to authorize Michael A. Sweeney to purchase the sash and doors, in the event he selected them, for me, and it was addressed 'to whom it may concern' as it was not known where it would be presented." This evidence, while it was clearly error to admit it, was harmless. It did not hurt appellant because it did not tend to change or affect the plain meaning of the words used in the letter itself. The letter authorized Sweeney to purchase such lumber as he might select for appellee, not for the M. A. Sweeney Company, or for anyone else, other than appellee himself. The plain meaning of the letter delivered to M. A. Sweeney by appellee can not be mistaken. It was neither a strict guaranty nor an original undertaking; it simply authorized Sweeney to purchase lumber for appellee, and by its terms limited his authority in the matter of purchasing lumber to sales made to appellee himself. The case of *Nading v. McGregor*, 121 Ind. 469, and the other cases cited by appellant upon the legal effect to be given to the instrument signed by appellee are not in point. Judgment affirmed.

KENNEY, RECEIVER, v. WELLS ET AL.

[No. 2,966. Filed December 12, 1899.]

BILLS AND NOTES.—Consideration.—An answer in an action on a promissory note alleging that the note was executed to take the place of a note past due, secured by a mortgage on a threshing machine, upon the agreement that the payee, in consideration thereof, waived his right to take possession of the property upon the maturity of the second note, and until such time as the defendants should be able to reimburse themselves out of the proceeds of running the machine, but that the payee took possession of the property before the defendants were reimbursed, shows a failure of consideration in the execution of the note. *pp. 490-492.*

PLEADING.—Demurrer.—A demurrer to the second and third paragraphs of answer for the reason "that neither of said paragraphs states facts sufficient to constitute a defense to this action," is a joint demurrer, and if not good as to both paragraphs it need not be considered as to either. *p. 492.*

APPEAL AND ERROR.—Instruction.—Theory.—A cause will not be reversed on the ground that an instruction does not correctly state the issue, where it is stated in the appellee's brief that the cause was tried on that theory, and the pleadings fairly admitted of such theory. *pp. 493, 494.*

From the Knox Circuit Court. *Affirmed.*

W. H. DeWolf and W. C. Johnson, for appellant.

L. A. Meyer, W. A. Cullop and C. B. Kessinger, for appellees.

COMSTOCK, J.—The appellant asks a reversal of the judgment rendered in this case in the court below for two reasons: (1) Because the court erred in overruling the demurrer of the appellant to each paragraph of the separate answers of the appellees; (2) because the court erred in overruling appellant's motion for a new trial.

The suit is upon a promissory note executed by one Thomas F. Jarrell and the appellees. The appellees alone defended. Jarrell was defaulted, but no judgment was rendered against him. The complaint alleges, in substance, that C. Aultman & Company is a corporation organized

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under the laws of Ohio, and that on December 18, 1893, in the Marion Circuit Court, William A. Lynch and Edward T. Kenney were appointed receivers of the assets of the corporation; that said Kenney qualified, but that said Lynch did not qualify; that, as such receiver, Kenney took possession of all the property of said corporation and is still acting as such receiver; that there came into his hands two promissory notes payable to said corporation, executed by the defendant, Thomas F. Jarrell, upon which payments had been made, and that afterwards in settlement of the balance due upon such notes, the defendants executed the note in suit, payable to the plaintiff by the style of C. Aultman & Company; that the note is due and unpaid, except the sum of \$192.76, which has been paid. A copy of the note is filed with the complaint.

The appellant's demurrers to the amended second and third paragraphs of answer were overruled. The substance of the "amended second paragraph" is: that they executed the note in suit; that Jarrell was indebted to the plaintiff in the amount of two promissory notes, which notes were secured by a chattel mortgage, executed by Jarrell to C. Aultman & Company, upon certain personal property, consisting of a separator, a truck, and stacker and fixtures belonging thereto, also one Star stacker complete, and one two-horse engine; that the first note secured by the mortgage was due and unpaid; the second note was not due, and that by the provisions of the mortgage the plaintiff was entitled to take possession of the property because of the default in the payment of the note past due; that appellees were requested and solicited by plaintiff to execute the note in suit, and that plaintiff agreed that if the appellees would execute the note he would waive his right to take possession of the mortgaged property and his right to foreclose the mortgage "upon the maturity of the note, not then due, in favor of these defendants, and until such time as these defendants should be able to reimburse themselves out of the proceeds of running the

machine;" that appellees thereupon executed the note, and in consideration thereof appellant waived his right to take possession of the property and the lien of his mortgage upon the maturity of the second note, and defendants took possession of the property with the consent of Jarrell and the plaintiff, and operated the same; and that afterwards, and before the proceeds of the machine were sufficient to reimburse the appellees, appellant, without the consent of appellees, took possession of the property described in the mortgage, and converted the same to his own use, by reason whereof the consideration of the note has failed.

The third paragraph is in all respects the same as number two, except that it is filed as a counterclaim.

Under the first specification of the assignment of errors it is argued by appellant that the facts set out in the second paragraph do not amount to a failure of consideration. The answer shows a valid consideration for the execution of the note. It shows also a violation of the contract when appellant took possession of and converted to his own use the property mentioned in the answer, without the consent of appellees, thus taking from them the machinery before they had been enabled to earn, by its use, the amount sufficient as by the terms of the agreement they were to be permitted to do to discharge the note. It avers a violation of the agreement for the use of the machinery, which was the consideration for its execution by the appellees. The demurrer is in the following language: "The plaintiff demurs to the second and third paragraphs of the defendants Wells and Brocksmith's answer herein and says that neither of said paragraphs states facts sufficient to constitute a defense to this action." It is a joint demurrer, and not being good as to the second paragraph, we need not further refer to the third. See *Gilmore v. Ward*, 22 Ind. App. 106, and authorities there cited.

Of the reasons set out in the motion for a new trial and discussed by appellant are : (1) That the verdict of the

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jury was not sustained by sufficient evidence; (2) that the verdict of the jury is contrary to the evidence. An examination of the record discloses that there is evidence fairly tending to support the verdict. These reasons, therefore, are not well founded. The only other reason for a new trial, referred to by appellant, is that the court erred in giving instruction number one, asked by defendants. The instruction is in the following language: "The court instructs the jury that if you find from the evidence that the consideration and the only consideration for the execution of the note sued on was that the defendants Wells and Brocksmith were to have the property mentioned in their answer and use it until it earned sufficient over and above the operating expenses to reimburse them for the liability incurred on account of the execution of the same, and you further find that before it had earned such amount the plaintiff took possession of the same and sold it without their consent, and you find the defendants turned over the surplus above running expenses to the plaintiff, then the court instructs you the consideration for the unpaid balance of said note failed, and your verdict should be for the defendants."

It is claimed that this instruction does not correctly state the issue; that it is founded upon the theory that appellant agreed to give the appellees the use of the machinery until by operating it they could make enough to pay the note in suit. In the brief of appellees' counsel, it is stated that this was the theory upon which the cause was tried. The pleading fairly admitted of this theory. The objection is not well taken. These are all the questions discussed by appellant.

Counsel for appellees have asked that this appeal be dismissed because Jarrell, whom they claim is a necessary party to the appeal, has not been made a party. They also earnestly argue that the questions raised by the motion for a new trial can not be considered because the evidence is not properly in the record.

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Having reached the conclusion that the judgment should be affirmed upon its merits, we have treated the appeal as properly taken, and the evidence as in the record. Judgment affirmed.

MORROW, SURVEYOR, ETC., v. GEETING ET AL.

[No. 2,733. Filed December 13, 1899.]

JUDGMENT.—*Motion to Correct.*—*Review on Appeal.*—The action of the trial court in overruling a motion to strike out part of a judgment is not reviewable on appeal. p. 496.

SAME.—*Correction.*—*Pleading.*—*Motion.*—A motion directing the court's attention to the specific record in which a judgment was rendered, to the parts sought to be stricken out, and assigning reasons therefor, is sufficient to correct a judgment rendered by such court at a previous term. pp. 496, 497.

DRAINS.—*Assessments For Repair Do Not Bear Interest.*—Assessments against lands, under §5631 Burns 1894, for the repair of a ditch do not bear interest as do judgments for the recovery of money. pp. 498-501.

From the Howard Circuit Court. *Affirmed.*

J. C. Blackledge, C. C. Shirley, M. Bell, W. C. Purdum, B. C. Moon and C. Wolf, for appellant.

J. F. Elliott and W. C. Overton, for appellees.

WILEY, C. J.—The surveyor of Howard county made assessments against the lands of appellees and others for the purpose of creating a fund to pay for cleaning out and repairing a public ditch. From such assessments appellees appealed to the circuit court. Issues were joined, trial by the court. At the request of one of the parties, the court made a special finding of facts, and stated its conclusion of law thereon. As its conclusion of law the court stated that appellees' lands were not lawfully assessed, and rendered judgment accordingly. From this judgment the surveyor appealed, and this court reversed the judgment, and directed the trial court to restate its conclusions of law and confirm the assessments. *Morrow v. Geeting*, 15 Ind. App.

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358. When the opinion of this court was certified to the court below, the judge made upon the bench docket the following entry, or memorandum: "Assessment of county surveyor approved per direction of Appellate Court, at deft's cost." From this minute or memorandum upon the bench docket, the clerk entered upon the order-book the judgment confirming the assessments, etc. That part of the order-book entry which is questioned in this appeal is as follows: "Come again the parties by their attorney, and this court, by direction of the Appellate Court of Indiana, now restates its conclusions of law, that the assessments made by plaintiff, and set forth in said finding, should be approved. It is therefore considered by the court that the said assessments be approved and confirmed by the court and that they bear interest at the rate of six per cent. per annum from the date of the finding," etc. Also by the order and judgment of the court, the clerk was directed to certify the judgment and assessments so confirmed to the auditor of Cass and Howard counties, where the lands were situated, and the judgment directed such auditors to place said assessments "with interest as aforesaid" upon the tax duplicates to be collected as other taxes are collected, etc. At the succeeding term of court, the appellees filed a motion to modify the judgment so entered, so as to eliminate therefrom all that part of the judgment decreeing that such assessments should bear interest from the date of the finding. To this motion appellant voluntarily appeared, and such proceedings were had that appellees' motion was sustained, and the judgment and order of the court modified accordingly. The appellant reserved his exception to such modification and has brought the motion, the ruling thereon, and his exception, into the record by bill of exceptions. Appellant moved for a "new trial of the motion to strike out parts of the judgment," for the reasons (1) that the finding of the court was not sustained by sufficient evidence; (2) that the finding was contrary to law, and (3) because the court erred in admitting

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certain evidence. The motion to strike out all that part of the judgment relating to and requiring appellees to pay interest on the assessment against their respective lands was nothing more than an application to correct the judgment. The overruling of appellant's motion for a new trial of the motion to strike out parts of the judgment, which is assigned as error, does not, under the authorities, present any question. A motion to correct, modify, or strike out parts of a judgment is nothing more than a simple motion which is to be heard and disposed of in a summary manner. No pleadings are required, for the motion itself tenders the issue to be determined. *Clause, etc., Co. v. Chicago, etc., Bank*, 148 Ind. 680, was an application to correct the record of a judgment, and was in all essential respects like the case before us. The application or motion to correct was sustained. Appellant moved for a new trial on the motion to correct, which was overruled, and it assigned such ruling as error on appeal. In passing upon the question, the court said: "There was no available error in overruling the motion for a new trial. It has again and again been decided by this court that no pleadings are contemplated, or required in a proceeding of this kind. It is a simple motion to be heard in a summary way. Nor does the action of the trial court in either refusing or granting the application and the correction of the judgment furnish any ground for a motion for a new trial. The hearing of the motion is not a trial in any proper sense and our code of civil procedure does not contemplate a new trial of such motion, nor is a new trial thereof appropriate," citing *Runnels v. Kaylor*, 95 Ind. 503; *Blizzard v. Blizzard*, 40 Ind. 344. Continuing, the court said further: "The proper practice is to except to the action of the court in either refusing or making the amendment, and on appeal to assign such action of the trial court for error."

Without setting out at length appellant's assignment of errors, we will give the substance of them, viz: (1) That

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the court erred upon the hearing of appellees' motion to strike out parts of the record in permitting appellees to introduce in evidence the judgment, etc.; (2) that the court erred in overruling appellant's objection to the evidence of one Overton as to when appellees first learned the terms and nature of the judgment rendered; (3) that the court erred in permitting Lex J. Kirkpatrick, the judge before whom the original proceedings in the cause were had, to testify concerning his knowledge of the original judgment as rendered, and that the record was signed by him, although it was not read in his presence; (4) that the court erred in sustaining appellees' motion to strike out parts of the judgment; and (5) that the court erred in overruling appellant's motion for a new trial of the motion to strike out, etc. Appellant's counsel concedes that the first, second, third, and fifth specifications of the assignment of errors do not present any question for review. This leaves only the fourth specification of the assignment of errors for our consideration, and the question is properly saved and brought into the record by a bill of exceptions.

Appellant urges that the motion was insufficient in that it did not state the character of the issues, or set out the mandate of the Appellate Court in reversing the judgment on the former appeal. The objection to the sufficiency of the motion is predicated upon the assumption that, after the close of a term of court at which a judgment is rendered, the court no longer takes judicial knowledge of its prior proceedings, and that in subsequent motions, etc., such proceedings must be specifically pleaded. On the other hand, appellees insist that this is simply a motion to make the record speak the truth; does not seek to change the judgment, but to show the judgment as actually rendered. We think the motion was sufficient. The general rule is that formal pleadings are not necessary, but that an informal motion properly suggesting the correction or entry desired, and the reasons therefor, is sufficient. Elliott's Prac., §192, p. 190.

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In *Hebel v. Scott*, 36 Ind. 226, it was said: "In such motions as this, special pleadings are not contemplated. The application is to the court, to be disposed of in a summary manner." See, also, *Harris v. Tomlinson*, 130 Ind. 426; *Clause, etc., Co. v. Chicago, etc., Bank, supra*; 3 Work's Prac. p. 604. By the motion now under consideration, the attention of the court was called to the specific record in which the judgment was rendered; also to the parts of it sought to be stricken out, and the reasons assigned therefor.

In Elliott's Prac. §192, note 3, on p. 186, the following is quoted from *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074: "All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time either upon the motion of the court itself, or at the instance of any party interested in the matter." The objections now urged by the appellant to the motion, on the ground that it is insufficient, are not well taken.

The real question for determination is simply this: Do the assessments, as made against the lands of appellees for the repair of the ditch described, and as confirmed by the court, as judgments, for the recovery of money, bear interest? A solution of this question involves the consideration of the principle upon which such assessments rest. The right to make such assessments is a statutory one, and the authority therefor is found in §5631 Burns 1894. By it, it is made the duty of the county surveyor to keep public ditches in repair, and for that purpose he is authorized to make assessments upon lands originally assessed for their construction, in proportion to benefits, etc. From such assessments an appeal will lie. If no appeal is taken, it is the duty of the surveyor to certify the assessments to the county auditor, who is required to place them upon the tax duplicate to be collected as other taxes. In case of appeal, and the assessments are confirmed, it is made the duty of the clerk to certify the assessments so confirmed to the auditor, whose duty it is to

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place them upon the tax duplicate and collect them in like manner. It is evident from the statute that it was not the intention of the legislature that the assessments so made by the surveyor should bear interest in the sense that an ordinary judgment for the recovery of money bears interest. If such was the intention, specific provision would have been made for it. If in the case before us there had been no appeal from the assessments, and they had been certified to the auditor, then it is certain that they would not have drawn interest, except such as is provided for by statute in case of delinquency for the non-payment of taxes. By the appeal from the assessments by appellees to the circuit court, and the confirmation of them by the order and decree of the court, is the rule so radically changed that the appellees shall be required to pay interest on their assessments? We think not. As we have seen, there is no provision of the statute whereby the assessments are to bear interest. The assessments become a lien upon the lands, and are to be collected as other taxes, for the purpose of reimbursing the county, from the treasury of which the costs of the repairs are first paid. Placing such assessment on the tax duplicates, to be collected as other taxes, shows the clearest intention that they are to become subject to the penalties fixed by statute for delinquencies for the non-payment of taxes, and nothing more. No one would contend but what if the assessments became delinquent for non-payment, that they would be subject to the penalties provided by §8570 Burns 1894. It follows, therefore, that if the assessments as confirmed by the court are to bear interest, then a double burden would rest upon appellees in case of delinquency, and this can not be upheld, either by law or equity. The assessments thus made are nothing more than an additional tax levied upon the lands of appellees for a specific purpose, and must be treated as such. Liens thus created are creatures of statute, and can only exist by virtue of a statute, and must be controlled by its provisions. *Cook v. State*, 101, Ind. 446. See, also, *Weaver v. Templin*, 113

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Ind. 298. Where a statute creates a new right and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all others. *Storms v. Stevens*, 104 Ind. 46.

Appellant argues that the confirmation of the assessments by the court below was a judgment, and that, under the general statute, such judgment would bear six per cent. interest. §7044 Burns 1894, provides that judgments for money shall bear interest at the rate of six per centum from the return of the verdict or finding of the court where there is no contract fixing the rate of interest. We can not believe that the statute just cited is effective in this instance and is of controlling importance. The statute authorizing such assessments to be made fixes the manner and the time of their payment, and it has been held that §7044, *supra*, does not have the effect of making a judgment draw interest until the amount adjudged to be paid is due. *Winemiller v. Winemiller*, 114 Ind. 540. The assessments thus confirmed by the circuit court and ordered to be certified to the auditors of the two counties in which the ditch was situated were not due till they were regularly placed upon the tax duplicate, and the time of their payment had come, as fixed by statute. They were to be collected as other taxes, and hence they would become due under the provisions of the general tax law, which fixes the time and manner of the payment. Nothing can be plainer than that these assessments were not due until the next taxpaying time arrived after they were placed on the duplicate. The assessments not being due when the court made its original finding, they were not chargeable with interest, as a judgment for money is, and not subject to any penalty until default in their payment, as other taxes. If not paid when due, the assessments would be subject to the statutory penalties of delinquency. *Cullen v. Strauz*, 124 Ind. 340.

The question now before us, as it seems to us, has been put at rest by the Supreme Court in the case of *Evansville, etc., R. Co. v. West, Treas.*, 139 Ind. 254. In that case the tax

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law of 1891 was under consideration and a construction placed upon it. The court, considering it as a whole, held that non-payment of the April instalment of taxes carries with it into delinquency the whole tax, to which is added a penalty of ten per centum; that if said taxes are not paid, but are still delinquent in November, an additional burden of six per centum thereon is imposed, and that to these penalties no additions can be made in the way of either penalties or interest, however long the delinquency continues. Now when we remember that these assessments are an additional tax, and one to be paid as other taxes, in view of the holding in the case just cited we do not see how there can be any doubt as to the question here presented. The record before us does not present a judgment for money, within the meaning of §7044, *supra*. An execution could not be issued upon the judgment entered, and the assessments thus be collected. It was so held in *Needham v. Gillaspj*, 49 Ind. 245.

There was no error in sustaining appellees' motion to modify and correct the judgment. Judgment affirmed.

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[No. 2,853. Filed December 18, 1899.]

PLEADING.—Judgments.—Jurisdiction.—Where it is averred in a complaint to enforce a judgment that the judgment was rendered by a court of general jurisdiction, it is not necessary that the averments show affirmatively that the court had jurisdiction to render the judgment sued upon. *p. 502.*

SAME.—Judgments.—A judgment is a debt of record, and, as such, may be made the foundation of an action, and, in a suit to recover such debt, an averment that it is due and unpaid is sufficient to show that the judgment is in full force. *p. 502.*

JUDGMENTS.—Appeal.—The holder of a judgment may bring suit for its enforcement pending an appeal. *p. 502.*

BILLS AND NOTES.—City Warrant.—A city warrant is not a negotiable instrument in such a sense as to protect a *bona fide* holder against defenses. *p. 503.*

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ATTORNEY AND CLIENT.—*Ratification of Act of Attorney.*—The fact that one remains silent and does not expressly disavow an act of an attorney is not of itself conclusive of ratification. pp. 503, 504.

ESTOPPEL.—*Attorney and Client.*—A judgment creditor will not be estopped from maintaining an action for the enforcement of a judgment by the fact that she did not disavow a settlement made by her attorney, by reason of which a proposed appeal from the judgment was abandoned, where it is not shown that plaintiff knew all of the facts concerning the settlement and proposed appeal, or that she kept silent for the purpose of inducing the judgment debtor to abandon the appeal. p. 504.

From the Porter Circuit Court. *Affirmed.*

J. Kopelke, Lawrence Becker and Peter Crumpacker, for appellant.

A. F. Knotts, J. O. Bowers and B. Borders, for appellee.

ROBINSON, J.—Appellee sued on a judgment previously recovered against appellant awarding damages for personal injuries. The first error assigned questions the sufficiency of the complaint. We can not agree with counsel that the complaint fails to charge that appellant obtained the judgment, and that the same is in full force and unreversed. The amended complaint avers that in 1895 appellee was married to one Charles Evans; that October 6, 1894, her name was Viola Johnson, and on that date she obtained a judgment against appellant, in a named sum, duly given and rendered by the Lake Circuit Court in an action then pending in that court; that such judgment is due and wholly unpaid. The suit was brought in February, 1896, and the amended complaint was filed May 18, 1896. It shows that the judgment was rendered by a court of general jurisdiction, and need not show affirmatively that the court had jurisdiction. A judgment is a debt of record, and as such may be made the foundation of an action. And in a suit to recover such a debt an averment that it is due and unpaid is sufficient to show that the judgment is in full force. Although an appeal may have been taken and is still pending, the holder of the judgment may bring suit on it pending the appeal. The com-

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plaint states a cause of action. See *Palmer v. Glover*, 73 Ind. 529; *Gould v. Hayden*, 63 Ind. 443; *Line v. State, ex rel.*, 131 Ind. 468; *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411.

It appears that the former judgment was rendered October 6, 1894. On the 16th of July, 1895, one of appellee's attorneys of record compromised and settled the judgment with the city, and received a warrant for the sum agreed on. The warrant was not paid for want of funds, and the attorney discounted it and kept the proceeds, no part of which was ever paid to appellee. The city paid the warrant April 29, 1896, some time after suit was brought on the judgment.

Although a city warrant is an evidence of indebtedness upon which the holder may maintain an action, and constitutes a *prima facie* cause of action, yet it is not a negotiable instrument in such a sense as to be protected in the hands of a *bona fide* holder against defenses. *City of Connersville v. Connersville, etc., Co.*, 86 Ind. 184.

It is argued that a new trial should have been granted because of newly discovered evidence, and that the verdict was not supported by the evidence and was contrary to law.

The answers relied upon by appellant pleaded this compromise and settlement of the former judgment by the attorney, the ratification of such settlement by appellee, and estoppel. The evidence is directly conflicting whether the attorney had authority to make the settlement, and the jury's determination of that question can not be reviewed by this court.

There is evidence to show that the act of the attorney in making the settlement and compromise was ratified by appellee, but upon this question the evidence is conflicting. No good purpose would be subserved in setting out the evidence. It is not claimed that the evidence showing a ratification is uncontradicted. The jury, and the trial court upon the motion for a new trial, have weighed the evidence, and

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their conclusion as to the preponderance is final. It was not necessary that appellee should expressly disavow the act of the attorney, and her silence would not be conclusive of ratification. Thus it is said: "The silence of a party, with the knowledge of what has been done for him in his name, is evidence of ratification, of more or less force, according to the circumstances in which it occurs." *Haggerty v. Juday*, 58 Ind. 154.

It is further argued that appellee is estopped to deny the settlement, as she did not disavow it as soon as she learned of it, or within a reasonable time, and that appellant gave up the appeal it was about to perfect in consequence of the compromise. It is by no means clear from the record that the necessary steps had been taken to perfect an appeal when the compromise was made. But even conceding this, some of the elements of estoppel as declared by the Supreme Court are wholly wanting. It is not shown that appellee knew all the facts about the attempted settlement, and about the proposed appeal, or that appellee kept silent for the purpose of inducing the city to abandon the appeal. There is not knowledge on one side and ignorance on the other. The facts fail to show any fraud. See *Karnes v. Wingate*, 94 Ind. 594; *Terre Haute, etc., R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164.

The newly discovered evidence because of which a new trial was asked consisted of two letters written by appellee to the attorney who made the compromise. These letters would have been competent evidence to go to the jury in determining whether the appellee had ratified the attorney's act. They were not competent for any other purpose. They were evidence of the same kind and to the same point as the letter of appellee to the attorney which was read in evidence. It is well settled that evidence of the same kind and to the same point is cumulative and that a new trial will not be ordered because of newly discovered evidence when such

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evidence is cumulative. *Hines v. Driver*, 100 Ind. 315; *Offutt v. Gowdy*, 18 Ind. App. 602.

The other questions reserved are waived because not discussed. Judgment affirmed.

PEIRCE, RECEIVER, ETC., v. CHISM.

[No. 2,886. Filed December 14, 1899.]

RECEIVERS.—Action Against.—Complaint.—The complaint in an action against a receiver must contain an averment that leave to bring the action had been obtained from the court by which the receiver had been appointed.

From the Howard Superior Court. *Reversed.*

C. G. Guenther and *A. B. Clark*, for appellant.

J. C. Blacklidge, *C. C. Shirley* and *C. Wolf*, for appellee.

HENLEY, J.—This was an action brought by the appellee against the appellant to recover damages arising from the alleged negligent killing of appellee's horses. It appears from the complaint that at the time of the commencement of the action the property of the corporation was in the hands of a duly appointed and qualified receiver. The only error assigned is the overruling of the demurrer to the first and second paragraphs of the amended complaint. The only objection pointed out by counsel for appellant is that neither paragraph of complaint avers that leave of court had been obtained to bring the action against the receiver. It seems to us that this objection to the complaint is well taken. Numerous and late decisions of both courts of appeal in this State have held that a receiver can neither sue nor be sued, without leave of the court is first obtained.

In the case of *Keen v. Breckenridge*, *Rec.*, 96 Ind. 69, the court said: "As a receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed, we think it is essential to aver in the complaint that leave to bring the action had been

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granted by the proper court." The exact question was also passed upon by the Supreme Court in the case of the *Fleming, Rec., v. State, ex rel.*, 134 Ind. 672, where the court say: "It seems to be settled that a receiver, as a general rule, can neither sue nor be sued, without leave of the court making the appointment is first obtained. This court in the case of *Vigo Real Estate Co. v. Reese*, 21 Ind. App. 20, say: "It is the law that a receiver can not sue or be sued without leave of the court making the appointment being first obtained," etc. See also *Hatfield v. Cummings, Rec.*, 142 Ind. 350; *Gainey v. Gilson, Rec.*, 149 Ind. 58. The reasons why this rule obtains are fully set out in the cases above cited, and it is not necessary that we prolong this opinion by repeating them. Nor is it necessary that we construe the case of the *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271, as the cases quoted from are later cases, and, if they establish a different doctrine, are controlling. It is provided by Congress "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." 24 U. S. Stat. at Large, 554, §3.

We can not presume that the receiver in this case was appointed by a United States Court. An averment that he was so appointed would have been sufficient, and would have avoided the other objection to the complaint that leave to sue had not been first obtained. Under the authorities in this State, we must hold that in the absence of the averment in each paragraph of the complaint that leave to bring the action had been granted by the proper court, both paragraphs of the complaint were insufficient. The judgment is

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therefore reversed, with instructions to the lower court to sustain appellant's demurrer to each paragraph of the amended complaint.

THE FARMERS INSURANCE COMPANY, ETC., v. BURRIS.

[No. 2,955. Filed December 14, 1899.]

INSURANCE.—*Complaint.—Ownership of Property.*—A complaint in an action on a fire insurance policy must allege that plaintiff was the owner of the property at the time it was destroyed. pp. 507, 508.

SAME.—*Complaint.—Ownership of Property.*—A complaint in an action on a fire insurance policy alleging that plaintiff was the owner of the property at the date of the policy, that the dwelling-house and contents, except certain enumerated articles, were entirely destroyed, and that "plaintiff suffered a total loss, all to his damage, in the sum of \$500," does not sufficiently aver that plaintiff was the owner of the property at the time it was destroyed. pp. 508, 509.

From the Martin Circuit Court. *Reversed.*

T. J. Brooks and W. F. Brooks, for appellant.

A. J. Padgett and J. A. Padgett, for appellee.

COMSTOCK, J.—This action was begun on a policy of insurance in the Daviess Circuit Court, and upon change of venue tried in the Martin Circuit Court.

A demurrer to the complaint for want of facts was overruled, and several paragraphs of answer and reply thereto were filed. The cause was submitted to a jury. A general verdict was returned in favor of appellee for \$237. With the general verdict answers to interrogatories were returned. The court overruled appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict, and rendered judgment in favor of appellee.

The policy sued on was issued on the following items: A dwelling-house and its foundation, household furniture, wearing apparel, a smoke-house, and provisions therein.

Under the second, sixth, and seventh specifications of the assignment of errors, appellant discusses the sufficiency of the complaint. The only objection made to the complaint

is that it does not aver that the property destroyed by the fire, and for the loss of which this suit was brought, was at the time of the loss the property of and owned by appellee. Such an averment is necessary. *Insurance Co. v. Coombs*, 19 Ind. App. 331; *Western, etc., Co. v. McCarty*, 18 Ind. App. 449, and authorities cited. Appellee concedes that such an averment is necessary, but claims that it need not be direct or specific, and that when an insurable interest in the property at the time of the fire may be implied or fairly inferable from the facts alleged, the complaint will be good after verdict.

The complaint contains the following averments: "On the 14th day of September, 1897 [the date of the policy], plaintiff was the owner," etc.; "that thereafter, to wit, on the 4th day of November, 1897, said dwelling-house caught fire, and was totally consumed by said fire, together with the contents thereof, except one feather bed, one clock, six quilts, and one trunk, all of the value of about \$10. *That as to all of the other property insured against loss in said policy plaintiff suffered a total loss, all to his damage in the sum of \$500.*"

Appellee claims that the words italicized imply ownership. Pleadings are construed most strongly against the pleader. One without being the owner of property may suffer loss by its destruction. The rule that a defect in a complaint will be deemed to be cured after verdict has been applied where its sufficiency is called in question for the first time in an appellate court, upon the ground "that as the complaint was not demurred to it must be held to be sufficient after verdict for the reason that the omissions were probably supplied by the evidence and cured by the verdict." *Cox v. Hunter*, 79 Ind. 590.

As heretofore stated, in the cause before us the sufficiency of the complaint was challenged by demurrer in the trial court. The ruling on that demurrer is assigned as error. In the following cases from our courts, it has been held that the

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averment in question is essential to a good complaint in actions of the character before us. *Aurora Ins. Co. v. Johnson*, 46 Ind. 315; *Aetna Ins. Co. v. Black*, 80 Ind. 513; *Aetna Ins. Co. v. Kittles*, 81 Ind. 96; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Indiana Live Stock Co. v. Bogeman*, 4 Ind. App. 237; *Western Assurance Co. v. Koontz*, 17 Ind. App. 60; *Western Assurance Co. v. McCarty*, 18 Ind. App. 449; *Insurance Co. v. Coombs*, 19 Ind. App. 331. These decisions, extending over many years, should not be disregarded.

Upon a second trial, the other questions discussed may not arise, and, in view of the record, we do not deem proper to pass upon them. Judgment reversed, with instruction to the trial court to sustain appellant's demurrer to the complaint.

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[No. 8,113. Filed December 14, 1899.]

APPEAL AND ERROR.—*Consolidation of Cases on Appeal.*—In consolidated cases, two defendants against whom two separate judgments were taken, joined in one appeal, filing but one assignment of errors, one transcript, and one brief in behalf of both. The issues between the appellees and each of the appellants were the same, and a decision of the questions raised would be conclusive against either appellant. The appellees appeared and entered joinder in error, and the cause was submitted by agreement. *Held*, that a subsequent motion on the part of the appellees to dismiss the appeal, on the ground that a separate appeal should have been taken from each judgment, came too late. pp. 510-512.

SAME.—*Pleading.*—*Answer.*—To sustain a demurrer to an answer is not available error where the defense set up therein affirmatively appears from a special finding of the jury within the issues to have no foundation in fact. p. 514.

GARNISHMENT.—*Release of One Garnishee Defendant.*—A release of one garnishee by attachment plaintiffs, while retaining all their rights against other garnishees, will not affect the other garnishees, indebted to the attachment defendant, and not to the garnishee released. p. 515.

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APPEAL.—Evidence.—Objection.—An objection to the admission of evidence on the ground that it is “incompetent, irrelevant and immaterial” is too general and indefinite to present any question on appeal. *pp. 515, 516.*

SAME.—Evidence.—Admissibility of.—Where a question asked a witness was objected to by opposing counsel, but the overruling of the objection was not assigned as cause for a new trial, the question as to the admissibility of the evidence will not be considered on appeal. *p. 516.*

EVIDENCE—Copy of Letter.—The introduction in evidence of a copy of a letter is not available error, where, afterwards, in connection with the testimony of the witness the original letter was introduced. *pp. 516, 517.*

SAME.—Objections Not Raised in Trial Court.—Objections to evidence not raised in the trial court will not be considered on appeal. *p. 517.*

SAME.—Telegram.—Agency.—Where the fact of agency is otherwise proved, it is not error to admit in evidence a telegram pertaining to the business of the agency, upon the ground that the telegram is a paper prepared by the agent to prove his agency. *p. 517.*

SAME.—Self-Disserving Declarations by Attachment Defendant.—Statements made by the attachment defendant after the garnishee has been served are not admissible, as self-disserving declarations, against the attachment plaintiff and in favor of the garnishee. *p. 520.*

TRIAL.—Witness Directed by Court to Leave Stand.—It is not prejudicial error for the court to direct a witness to leave the stand after such witness has answered the last question propounded to him on cross-examination, and no objection is made to his answer. *p. 520.*

From the Elkhart Circuit Court. *Affirmed.*

L. W. Vail, E. D. Salsbury and P. L. Turner, for appellants.

C. W. Miller, J. Drake, E. A. Dausman, W. L. Stonex, J. D. Osborn, A. S. Zook, A. Deahl and B. F. Deahl, for appellees.

BLACK, J.—An action was brought in the court below in 1893 by the LaPorte Carriage Company against the appellee James M. Jacobs, upon certain bills of exchange, and in attachment, and proceedings in garnishment were instituted against one Harry W. Hixon and the appellants, the Phenix Insurance Company of Brooklyn, New York, and the Penn-

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sylvania Fire Insurance Company, of Philadelphia, Pennsylvania. Many other creditors of said Jacobs, who are appellees herein, also brought actions and instituted proceedings in attachment and garnishment, filing under the cause so first instituted. The several claimants recovered judgment upon their causes of action and in attachment against said Jacobs. The original plaintiff having dismissed its proceedings in garnishment, the subsequent claimants prosecuted their proceedings against the appellants as garnishees under one of the causes, that of the appellee John E. Rigney. The two insurance companies, the appellants, each filed similar answers, in nine paragraphs. A demurrer to the ninth paragraph of each answer was sustained. The proceedings against the appellants on behalf of all the claimants were tried together by jury in consolidation with the case of said Rigney. The jury found that the garnishee defendants, the appellants, should each be ordered to pay into court a certain specified sum; and the jury also returned answers to interrogatories submitted upon requests of the parties. The appellants in one motion "each severally and separately" moved for a new trial, and to the overruling of this motion the appellants by counsel excepted, and thereupon the court rendered judgment against each of the appellants for a certain amount. In one assignment of errors, the appellants assign errors "severally and separately."

The claims against the appellants were based upon their several policies of insurance upon a barn owned by said Jacobs, the attachment defendant. The appellees have moved to dismiss the appeal, assigning as grounds for their motion that separate judgments against each appellant severally are embodied in one appeal; that only one transcript of two separate cases is filed, that only one assignment of errors is made, and that only one brief is filed, and that on behalf of the two appellants jointly.

The transcript on appeal, with the assignment of errors, was filed in the Supreme Court on the 22nd of June, 1898,

and the appellees then appeared and entered their common joinder in error, and at the same time the parties submitted the cause for hearing by agreement, and a supersedeas was issued afterward under a stipulation of the attorneys for the several parties, the time for the filing of the brief for the appellants was extended, and it was filed on the 14th of October, 1898. The motion to dismiss was filed on the 10th of April, 1899, and on the 17th of the same month the cause was transferred to this court.

The issues between the appellees and each of the appellants were alike, and they were all tried together, and the matters in dispute here pertaining to the trial affected both of the appellants alike. We have jurisdiction of the persons and of the subject-matter. Whatever view might be the proper one to be taken of such a motion if made upon the first opportunity, we are of the opinion that the cause should be retained by us for the consideration of the assignment of errors.

After appearance of the appellees, and joinder in error and submission of the cause by agreement, we think the motion for the dismissal of the appeal was too late, where, as here, we may pass upon the questions affecting each of the appellants raised in the consolidated cases tried together, as well as if presented in separate appeals upon two transcripts, the decision in one of which would inevitably determine the result in the other.

The Phenix Insurance Company in its ninth paragraph of answer as garnishee alleged, in substance, against the further maintenance of the action, that the garnishment proceeding against that company was intended to reach a supposed indebtedness from it to said Jacobs on a contract of fire insurance entered into on the 9th of January, 1893, for a period of one year, whereby said company insured and agreed to indemnify said Jacobs against loss by fire on a certain livery barn, situated in Elkhart county, Indiana, which policy was issued at the Goshen, Indiana, agency of the company and

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numbered 843; that on the 9th of August, 1893, said barn was entirely destroyed by fire, and a claim was made by said Jacobs upon said company for payment under said policy of \$875; that subsequently, on the 12th of October, 1893, said Jacobs, by a written instrument, assigned all his right, title, and interest in and to said policy of insurance to one Henry W. Hixon, which instrument was set out in this paragraph of answer, bearing date of October 12, 1893, and purporting to be an assignment to said Hixon by said Jacobs of all the latter's right, title, and interest in and to policies No. 476 of the Pennsylvania Fire Insurance Company of Pennsylvania, No. 847 of the German American Insurance Company of New York, and No. 843 of the Phenix Insurance Company of Brooklyn, New York, all of said policies issued at their Goshen, Indiana, agencies, by the firm of Wilson & Wehmeyer, and all covering one livery barn and stock of said Jacobs, which burned on the 9th of August, 1893, all of which insurance, it was stated, had been adjusted, but drafts not yet paid.

It was further alleged that after the commencement of the attachment and garnishment proceedings herein, to wit, on the 12th of February, 1895, all the plaintiffs by their attorneys made a full and complete settlement of said claims with said Hixon, and he paid plaintiffs \$200, as and for a complete settlement of said claim, and all claims and demands against him as the assignee of said Jacobs and garnishee in this proceeding, and the plaintiffs, by a written instrument duly executed, released, settled, and compromised all their claims and demands against said Hixon as assignee of said policies and as garnishee defendant herein, which written instrument is set out. It was thereby stated that, in consideration of the sum of \$200 cash paid by said Hixon, the subscribing attorneys representing all the attachment and garnishee plaintiffs in the various causes then pending in the court below, wherein said Jacobs was attachment defendant and the appellants and said Hixon were garnishee defendants, agreed that,

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as to the further prosecution of said actions against said garnishee defendants, the signers of the instrument would collect from the appellants, if collection could be made against said insurance companies, and if they should fail to collect from the appellants, then, and in any event, all garnishee proceedings against said Hixon should be dismissed at the costs of the plaintiffs.

It was further alleged that said claim under policy No. 843 was the only claim held by said Jacobs or his assignee, said Hixon, at the commencement of the garnishment proceedings herein as against said Phenix Insurance Company; that on the 12th of February, 1895, said Hixon paid the plaintiffs and attaching creditors said sum of \$200, and they accepted said sum in full discharge of all claims against said Hixon as the assignee of said Jacobs and as garnishee in said action; which claim so settled and compromised was the same claim in controversy between said creditors and said Phenix Insurance Company.

The ninth paragraph of answer of the appellant the Pennsylvania Fire Insurance Company was the same as the ninth paragraph of answer of the other appellant except as to the name of the company and the number of the policy.

Of course, the meaning and effect attributed by the pleader to the written instruments set forth in the pleading as the foundation thereof must yield to the proper construction of the terms of the instruments themselves. Any supposed interest of the appellants in the connection of Hixon with the proceeding would depend alone upon the alleged assignment set forth in the answer. If he became the real owner of the claims upon the policies before the institution of the proceedings in attachment and garnishment, the appellants could not be made liable as creditors of Jacobs. The appellants were not deprived by the ruling on the demurrer to the ninth paragraph of answer of a presentation of the question as to the effect of this alleged assignment, which was set up in another paragraph of answer by each of the appel-

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lants, and the jury found specially that it was a sham in fraud of Jacob's creditors, and that Hixon was not at any time the real owner of the claims against the insurance companies.

If the attorneys for the appellees without special authority might bind their clients by a release of a garnishee made out of court, the release of Hixon as garnishee could not affect the liability of the appellants, if they were not indebted to Hixon but continued to be indebted to Jacobs. The pretense of the ownership of Hixon being thus negatived, there could be no available error in excluding from the trial of the cause a question whose effectiveness depended wholly upon the truth of such pretense. But, whether or not the sum of \$200 mentioned in the release was paid by Hixon, as asserted in argument, on account of money collected by him upon a policy on the personal property in the barn, it does not appear from the answer that the appellants at the time of this release had paid anything on their policies, and the release set forth in the answer was merely an agreement to pursue the appellants alone as garnishees, that is, as parties indebted to Jacobs, and to dismiss the garnishee proceedings against Hixon. Such an agreement would not release the appellants for any real indebtedness of these insurance companies to Jacobs; that is, from their liability as garnishees. There was no recognition of the effectiveness of the assignment to Hixon. The right to prosecute further the proceedings against the appellants was expressly reserved, and all the consequences, favorable to the plaintiffs, that might accrue to Hixon through such further prosecution were impliedly included in the reservation. The agreement thus stipulating for the further prosecution of the actions and to establish as against the appellants as garnishees that the assignment, as charged in the affidavits in attachment, was made to defraud creditors, could not operate as a bar to such further prosecution.

On the trial, Frederick G. Cowie, a witness for the appellees, was asked on their behalf what relation, if any, Robert

R. Manners and William N. Johnson occupied to insurance companies, and to what insurance companies. Counsel for the appellants objected to the question, stating as grounds of objection, "that it is incompetent, irrelevant, and immaterial." The objection having been overruled, the witness answered: "Mr. Manners, as I understood from himself, was the adjuster for the Phenix Insurance Company, of Brooklyn, New York; Mr. Johnson was a general adjuster, I believe, for the Pennsylvania and one other company. I forget what it was now."

The appellants assigned as a cause in the motion for a new trial the admitting of this testimony, and in argument it is contended that it was improper for the witness to testify that he learned from Mr. Manners that he was adjuster, for the reason that agency could not be so proved; also, that the answer that Manners was an adjuster was but the statement of a conclusion.

Aside from the fact that the objection was too general to present any question (*Swaim v. Swaim*, 134 Ind. 596; *Miller v. Dill*, 149 Ind. 326; *Mortgage Trust Co. v. Moore*, 150 Ind. 465; *State v. Hughes*, 19 Ind. App. 266), the overruling of the objection was not assigned as cause for a new trial, and the impropriety of the question is not urged by counsel. If the answer contained improper matter, there was no motion to strike out the answer or any part of it, nor was the impropriety of any part of the answer suggested to the court in any manner.

What we have said of this cause in the motion for a new trial is sufficient for the disposal of some other causes discussed in the briefs of counsel.

Objection was made to the introduction in evidence on behalf of the appellees, in connection with the deposition of one of their witnesses, of a letter-press copy of a certain letter, upon the ground that no proper foundation had been laid for the introduction of a copy. Upon the statement of counsel for the appellees that notice had been served upon the

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defendant to produce the original letter, and that the defendant could not produce it, the court overruled the objection and the copy was introduced. Afterward, in connection with the testimony of this witness, the original letter was introduced. We can not conclude that the defense was improperly affected by the introduction of the copy.

Some of the objections urged here in argument to certain evidence introduced on behalf of the appellees do not appear to have been suggested to the trial court. This is a sufficient reason why such objections should not be pressed in this court.

There was objection to the introduction in evidence of a certain telegram sent from Cowie to Wilson & Wehmeyer, the ground of objection being that the telegram was a matter introduced by the agent himself to prove his own agency, a paper prepared and executed by himself to prove his own agency. This objection was not well taken. The agency of the sender and that of the receivers of the telegram were sufficiently proved, and the telegram related to the business in which they all were acting as agents. It was proof of a pertinent act of the agent, whose agency was otherwise proved.

A witness for the appellants, one John Dunn, testified that he met the attachment defendant, Jacobs, at Golconda, Illinois, in April, 1894, and that the witness was then in the employment of a certain detective agency. On his examination as a witness, he was asked on behalf of the appellants to state what conversation he had at that time and place in relation to going to do business under a partnership arrangement. The appellees having objected to this question, the appellants offered to prove by the witness that he inquired of Jacobs his ability to put up his share of the money, to which Jacobs replied that he would have a considerable sum paid him in a short time from the insurance companies at Goshen, Indiana; that he had insured his livery barn; that he said to the witness that if their business did not prove satisfactory, they

could after a while insure it and sell it to the insurance companies, that he had done that before, and it was a thing easily accomplished if carefully managed; that this conversation took place at Golconda, Illinois, about April 21, 1894. Thereupon the court sustained the objection of the appellees. In answer to another question the witness testified that he had a conversation with Jacobs in the latter part of June or the first of July, 1894, relative to burning his barn in Goshen. He was then asked by the appellants to relate that conversation. Counsel for appellees objected to the question, and the appellants offered to prove by the witness that he did have a conversation with Jacobs in relation to the burning of his barn; that Jacobs told the witness about the horses that were burned and about the buggies that were scorched, and as he came to the origin of the fire he laughed and said that they had never been able to prove what that was; and after a few minutes conversation on that subject, he said: "I am talking about this fire, and my attorney at Goshen and John E. Rigney wrote me never to talk about it, as perhaps the insurance companies might have a man down here to get all the information they can, and, for all I know, you may be working for the insurance companies or may be a con. man, although you have done me some good turns and always been my friend." It was thereupon stipulated and agreed between the parties that this witness was sent to interview Jacobs on the subject of this fire by the insurance companies, at the time of this last conversation, and at that time the witness was in the employ of these insurance companies, and had been sent by them to see Jacobs. Whereupon, the court sustained the objection to the question.

It is contended by the appellants that the testimony thus offered by the witness Dunn was competent; but we think the court did not err in its rulings.

The alleged conversations with Jacobs occurred long after the commencement of the proceedings in attachment and garnishment, and long after the appellants had appeared

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therein and filed their answers as garnishees. Whatever may be said concerning the statements of Jacobs to which the witness Dunn would have testified, if they had been made by Jacobs testifying as a witness in this cause, they were plainly hearsay, and the offered evidence was inadmissible, unless what was to be related by the witness could be regarded as constituting admissions on the part of Jacobs prejudicial to himself and favorable to the garnishees, and, unless so regarded, they were admissible against the attaching creditors. Whether or not they were really self-disserving as to Jacobs we need not pause to inquire, but assuming that they might be so regarded, then we can not hesitate to hold that the rights of the attaching creditors could not be affected thereby.

An admission which is non-contractual, one which does not, by reason of having been acted upon, amount to an estoppel, and which may be shown in evidence against a party, does not constitute evidence itself of a fact in issue, but is merely a waiver by the party who made it of his right to require the other party to prove a particular fact in issue. The admission merely relieves the party relying upon it from proving the fact.

It would open the way to fraud to permit the owner of a chose in action to defeat the claim against his debtor by an admission made, not under oath and out of court, to a stranger, after an attachment plaintiff had acquired a right in such chose in action by his proceeding in garnishment and while the cause was still progressing against the garnishee.

Though by reason of the right of the attachment defendant to any surplus remaining after the payment of the claims of attaching creditors he may be said still to have some interest in the debt of the garnishee, it is not an interest held by the attachment defendant jointly with the attachment plaintiff, but there is rather a community of interest in such case where there will be such a surplus; and in any case, that is, whether or not there will be such a surplus, the

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interests of the attachment plaintiff and defendant are hostile, and the latter may not by his acts or statements subsequent to the service of the garnishment waive the rights of the former, or relieve the garnishee from his liability to the attaching creditor.

Statements made by the attachment defendant after the garnishee has been served are not admissible, as self-disserving declarations, against the attachment plaintiff and in favor of the garnishee.

In *Warren v. Moore*, 52 Ga. 562, it was held, that in a case of garnishment the sayings or letters of the principal debtor made or written after service of garnishment are not competent evidence against the plaintiff to show want of title in the debtor to the property or effects in the hands of the garnishee.

In *Willis v. Holmes*, 28 Ore. 265, 42 Pac. 989, it was held that statements of the attachment defendant to the effect that he had been paid by the garnishee, made after the service of the garnishment, to persons not parties, were not admissible in evidence against the attachment plaintiff.

George Warren, a witness produced by the appellees, having testified as to the reputation for truth of one Edward Tipmore, who had testified as a witness for the appellants, was cross-examined on behalf of the appellants. After he had answered a number of questions on cross-examination, he was directed by the court to leave the witness stand, which the witness did; whereupon the appellants excepted to the action of the court in ordering the witness to leave the stand before the cross-examination was completed.

The witness had answered the last question propounded to him before the court directed him to leave the stand, and the answer had not been struck out, and there was no motion on behalf of the appellants to strike it out. After the court had so relieved the witness no question was propounded to him by either party. In the absence of a question to the witness, we can not say that the appellants were injuriously

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affected by the action of the court; to do so, we must be able to see how they were harmed; and to say that they were harmed in any respect would be mere conjecture.

The judgment is affirmed.

HALL v. THE STATE, EX REL. HAYDEN.

[No. 2,981. Filed December 19, 1899.]

APPEAL AND ERROR.—Record.—Instructions.—Instructions requested by a party are made a part of the record without a bill of exceptions when signed by the party or his attorney and filed as a part of the record, although not signed by the judge. *pp. 521-524.*

SAME.—Record.—Instructions.—Instructions given by the court of its own motion which are not signed by the judge are not properly in the record. *pp. 521-524.*

SAME.—Instructions.—Memorandum.—A memorandum of exception signed by the judge and dated will not make an instruction to which it is appended a part of the record. *pp. 521-524.*

SAME.—Instructions.—Where it does not affirmatively appear that all of the instructions given by the court are in the record, the refusal to give instructions asked will not be considered. *pp. 524, 525.*

From the Madison Circuit Court. *Affirmed.*

W. A. Kittinger, E. D. Reardon and W. S. Diven, for appellant.

W. L. Taylor, Attorney-General, D. W. Scanlan, J. N. Templer, C. C. Ball and E. R. Templer, for appellee.

BLACK, J.—This was a proceeding in bastardy. The argument on behalf of the appellant is chiefly devoted to a discussion of the evidence; but we could not disturb the result reached against the appellant without drawing inferences of fact, and weighing conflicting testimony, and thereby invading the exclusive province of the jury and the trial court.

It is also objected that the court erred in giving the first instruction of a series of instructions given by the court upon its own motion, and in refusing to give the tenth and eleventh instructions of a series proposed by the appellant. No instructions are in the record by bill of exceptions. Four

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instructions are inserted in the transcript as instructions given by the court. These instructions are not signed by the judge, but in connection with the first one of them is a memorandum of exception signed by the judge and dated.

A series of instructions is set out as instructions requested by the appellant before the commencement of the argument. These instructions are numbered and signed by the attorneys for the appellant, and they are shown to have been filed. In connection with each of two of them, the tenth and eleventh, there is a memorandum of exception signed by the judge and dated.

It was provided in the code of 1852, §324: "All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." This provision was continued in force by §376 of the code of 1881, §533 R. S. 1881. *Olds v. Deckman*, 98 Ind. 162; *Childress v. Callender*, 108 Ind. 394. In §325 of the code of 1852 it was provided that a party excepting to the giving of instructions, or the refusal thereof, should not be required to file a bill of exceptions; "but it shall be sufficient to write at the close of each instruction 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney." The above quoted portion of this section is changed in §378 of the code of 1881, §535 R. S. 1881, so as to provide that it shall be sufficient "to write on the margin or at the close of each instruction, 'refused, and excepted to,' or 'given, and excepted to;,' which memorandum shall be signed by the judge and dated."

In *O'Donald v. Constant*, 82 Ind. 212, it is said to be clear that "instructions, in order to be made a part of the record, under §§324 and 325 of the code," of 1852, "must be filed as a part of the record, and the fact of such filing must be shown in the transcript. The instructions given must be signed by the judge."

In *Supreme Lodge v. Johnson*, 78 Ind. 110, it was said

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that §324 of the code of 1852 required that all instructions given by the court must be signed by the judge and filed, together with those asked for by the parties, as a part of the record, and that under the code of 1881 the practice is so far modified as to require that the memorandum, "given and excepted to," or "refused and excepted to," shall be signed by the judge and dated, but that the filing is still necessary, citing §§533, 535 R. S. 1881. See also *Louthain v. May*, 77 Ind. 109.

In *Landwerlen v. Wheeler*, 106 Ind. 523, it was said that §533 R. S. 1881 provides that "all instructions given by the court must be signed and filed," etc., and that it had been held in a number of cases, that "to make instructions a part of the record without a bill of exceptions, they must not only be excepted to as provided by §535, *supra*, but they must also be signed by the judge and filed as provided by §533, *supra*." See also *Butler v. Roberts*, 118 Ind. 481; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378; *Elliott v. Russell*, 92 Ind. 526; *Heaton v. White*, 85 Ind. 376; *Van Sickle v. Belknap*, 129 Ind. 558; *Conduitt v. Ryan*, 3 Ind. App. 1; *Fromlet v. Poor*, 3 Ind. App. 425.

The rule as expressed in *Landwerlen v. Wheeler, supra*, is a logical application of the above quoted provisions of the code construed together. The instructions given by the court are made part of the record when these *instructions* are signed by the judge and filed as a part of the record. Instructions requested by a party are made part of the record when these *instructions* are signed by the party or his attorney and filed as a part of the record. An exception to the giving of any one of the instructions so made a part of the record, or to a refusal to give any one of them, may be taken and saved by the properly signed and dated memorandum, but the properly signed and dated memorandum alone will not bring the instructions into the record. Under this rule, the instructions requested by the appellant are in the record. It is not shown whether or not any of them were

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given, but it is shown that the tenth and eleventh were refused, and an exception was saved to the refusal to give each of these instructions. So, also, under the rule, none of the instructions given by the court of its own motion are in the record, because the instructions were not signed by the judge, though a memorandum of exception to one of the instructions set out in the transcript was signed by the judge and dated. Whether the giving of that instruction would be reversible error would depend upon the proper construction to be placed upon the concluding part, whereby the court told the jury that if, in addition to certain other matters of fact set forth in the instruction, the jury should find from a preponderance of the evidence that the relatrix did not have sexual relation with any other man than the defendant at or about 280 days prior to the birth of the child, "or at the time the child was begotten", the jury should find for the plaintiff. If the quoted words were omitted, the instruction would be erroneous, because the child might have been begotten at a shorter period before its birth than "about 280 days," as the evidence showed; but if the relatrix did not have sexual relation with any other man than the defendant either about 280 days before the birth or at the time the child was begotten, then she had such relation with the defendant when the child was begotten, and he might be found by the jury to be its father; and this seems to be a reasonable construction of the language of the instruction.

Whether this first instruction should or should not be regarded as in the record, if those asked by the appellant and refused can be regarded as correct instructions, there was no available error in rejecting them, it not appearing that the record contains all the instructions given by the court to the jury. Where the record fails to show that the instructions purporting to have been given by the court on its own volition were all the instructions given in the cause, the refusal of correct instructions, it has been held, is not available error.

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Wilson v. Johnson, 145 Ind. 40; *Conner v. Citizens Street R. Co.*, 146 Ind. 430; *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524.

Where it does not appear that all the instructions given by the court are in the record, the refusal to give instructions asked will not be considered. *City of New Albany v. McCulloch*, 127 Ind. 500; *Lehman v. Hawks*, 121 Ind. 541; *Stewart v. State*, 111 Ind. 554; *Ford v. Ford*, 110 Ind. 89; *McIlvain v. State*, 80 Ind. 69; *Board, etc. v. Nichols*, 139 Ind. 611, 619.

It is expressly provided by statute, §542 Burns 1894, §533 Horner 1897, that when the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party; and it will be presumed, the contrary not appearing, that the court has performed this positive duty. The trial court "is presumed to have given the jury correct instructions upon all the material points in the case." Elliott's App. Proc. §722.

It has been held that if the record does not affirmatively show that all the instructions are in the record, it must be presumed that the instructions refused, if correct, were embodied in some other instructions given either verbally or in writing. *Puett v. Beard, etc.*, 86 Ind. 104; *Grand Rapids, etc., R. Co. v. Cox*, 8 Ind. App. 29. The judgment is affirmed.

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[No. 2,933. Filed December 19, 1899.]

PLEADING. — Cross-Complaint. — Reformation of Instruments. — A cross-complaint seeking to reform and enforce a contract is bad on demurrer where the contract does not purport to be the contract of the party against whom its enforcement is asked, and there are no allegations connecting plaintiff with the parties to the contract. pp. 526-529.

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APPEAL AND ERROR.—Defective Cross-Complaint.—When Not Cured by Verdict.—A defect in a cross-complaint is not cured by verdict where the opposite party presented the question of its sufficiency by demurrer. *p. 529.*

From the Allen Superior Court. *Reversed.*

W. P. Breen and John Morris, Jr., for appellant.

Henry Colerick, for appellee.

HENLEY, J.—This action was commenced by appellant against appellee to recover for goods sold and for work and labor done. Appellee answered in four paragraphs. Appellant's demurrer was overruled to the first and second paragraphs of answer and sustained as to the third and fourth. Appellee also filed a cross-complaint. Appellant's demurrer to the cross-complaint was overruled. There was a trial by jury, resulting in a verdict and judgment in favor of appellee upon his cross-complaint. The first specification of the assignment of errors questions the action of the lower court in overruling appellant's demurrer to the cross-complaint. This cross-complaint is based upon a written contract which it seeks to reform. The pleading, omitting the exhibit, is as follows: "The defendant by way of cross-complaint to plaintiff's complaint says and alleges that on the 30th day of November, 1894, defendant entered into a verbal contract with the plaintiff whereby he was given the sole and exclusive agency for the sale of plaintiff's road machines, for the year 1895, in the counties of LaGrange, Steuben, Noble, DeKalb, Whitley, Allen, Huntington, Wells, and Adams, in Indiana, and the counties of Williams, Fulton, Lucas, Ottawa, Defiance, Henry, Wood, Sandusky, Erie, Lorain, Huron, Seneca, Hancock, Putnam, Allen, Auglaize, Hardin, Logan, Wyandotte, Crawford, Richland and Ashland, in Ohio. And the defendant further says that shortly thereafter the plaintiff requested one Fitzimmons, his agent, to reduce said contract to writing, and that said Fitzimmons undertook so to do and did reduce said contract to writing,

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except the stipulation that said defendant was to have the sole and exclusive agency for the sale of said machines therein, and omitted said stipulation therefrom; that said contract was duly signed by the parties thereto, and that said omission of said stipulation therefrom was by the mutual mistake of said defendant and said Fitzimmons as such agent. Cross-plaintiff further says that shortly thereafter he went to work upon said contract and expended the sum of \$200 in establishing his subagencies throughout the different towns in said territory; and defendant further says that he sold six of plaintiff's machines, three to D. A. Hermley & Company, and three to J. A. Sarber, each for \$235, and being at a profit of \$50 on each machine to this defendant; that plaintiff when notified of said sales and asked to deliver said machines refused so to do, and that defendant was prevented thereby from delivering the same, to his loss in the sum of \$300. He sold machines in some of the counties named therein for plaintiff according to the terms of said contract; and defendant further says that in others of said counties he was unable to make any sales, as well as his subagents, owing to the fact that, in violation of the terms of said contract, this plaintiff made and authorized other and different agents to make sales of said machines in territory by said contract given exclusively to this plaintiff; that said plaintiff and his other agents sold and offered to sell said machines at prices far below the market price, and far below the price at which said defendant, as well as his subagents, could sell said machines at any profit whatever; and the defendant further says that the said plaintiff sold his said machines to any and all persons wanting to purchase the same in said territory at prices much below the market price, and at prices much below any price at which said defendant could sell the same. And the defendant further says that by reason of said interference by said plaintiff, in offering his said goods in said territory in competition with said defendant, he drove said defendant from the market therein, and

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compelled him to make sales of said machines at actual loss, and prevented defendant from making contracts for the sales of said machines at the prices stipulated in said contract, by offering to sell the same at a price much lower than defendant was authorized to sell the same by said contract. Defendant further says that he was prevented from making sales of at least two machines in each of said counties at a loss to him, upon each machine, of \$50; and that upon one machine in each of said counties, after having made contracts for the sale of such machines, he was prevented from closing the same by reason of the fact that said plaintiff made said sales by offering his said machines at a much less price than defendant was authorized to sell the same by said contract; a copy of said contract, with said omission therefrom, is filed herewith and made a part hereof and marked Exhibit A. Wherefore defendant prays the court that said contract be corrected and rectified by inserting therein the stipulation omitted as aforesaid, and, on account of the damages as aforesaid, he offers to set off an amount equal to any amount that may be found due plaintiff, and prays judgment for the residue. Wherefore, by reason of said facts, defendant demands judgment for \$250 and all other proper relief."

The contract relied upon appears to be a contract entered into by and between appellee and the Fleming Manufacturing Company. The contract begins as follows: "This agreement made this 30th day of November, 1894, by and between the Fleming Manufacturing Company, Fort Wayne, Allen county, Indiana, party of the first part, and William Kaough, Fort Wayne, Allen county, Indiana, party of the second part, Witnesseth," etc. The contract is signed: "Fleming Manufacturing Company, by A. Fitzimmons. William Kaough."

In no place in the contract is appellant's name mentioned, nor does it appear in the signature. The cross-complaint contains no averment that appellant executed the contract by the name of the Fleming Manufacturing Company, or that

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appellant was doing business under such name, or that said Fitzimmons executed said contract for appellant under the name of the Fleming Manufacturing Company. We look in vain to the pleading for any averment even remotely connecting appellant with the parties to this contract. It is contended that this defect was cured by verdict, but we cannot so hold. Appellant presented the question of the sufficiency of the cross-complaint at the earliest possible opportunity under the rules of practice by demurrer, and he is entitled to a decision as to the sufficiency of the cross-complaint. *Fee v. State, etc.*, 74 Ind. 66; *Supreme Council v. Boyle*, 15 Ind. App. 342.

It has been held by the appellate courts of this State that the evidence will not be looked into to determine whether or not an error in overruling a demurrer to a bad complaint was harmful. *Supreme Council v. Boyle, supra*; *Spencer v. Spencer*, 136 Ind. 414; *Rhodes v. Hilligoss, Rec.*, 16 Ind. App. 478; *Dill v. Mumford*, 19 Ind. App. 609.

The record affirmatively shows that the relief asked by way of reformation of the contract was not granted. Appellee is satisfied with this judgment.

In an action to reform a written contract upon the ground of mistake in its execution, it is necessary that the contract be made a part of the complaint. *Pennsylvania Co. v. Holderman*, 69 Ind. 18. The contract which is made an exhibit in this case does not purport to be the contract of the party against whom the correction is urged or against whom its enforcement is asked.

Other alleged errors arising out of the overruling of appellant's motion for a new trial are discussed at length by counsel. We deem it unnecessary to pass upon these questions. The judgment of the lower court is reversed, and cause remanded with instruction to the lower court to sustain the appellant's demurrer to appellee's cross-complaint.

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[No. 2,982. Filed December 19, 1899.]

APPEAL AND ERROR.—Record.—Motions.—Pleadings Stricken Out.—

Available error cannot be predicated upon the action of the court in striking out a cross-complaint where the motion and cross-complaint are not made a part of the record by bill of exceptions or by order of court. *pp. 531, 532.*

NEW TRIAL.—Striking Out Cross-Complaint.—

Sustaining a motion to strike out a cross-complaint is not ground for a new trial. *p. 532.*

APPEAL AND ERROR.—New Trial.—Assignment.—Errors of Law.—

An assignment in a motion for a new trial for "errors of law occurring at the trial, and excepted to" does not specify any error of law. *p. 532.*

HUSBAND AND WIFE.—Action for Support.—Excessive Judgments.—

A judgment for \$200 in an action by a wife against her husband for the support of herself and child will not be held to be excessive where the evidence showed that the husband was steadily employed at \$40 a month, and had in cash and at interest \$1.100. *p. 532.*

From the Marion Superior Court. *Affirmed.*

F. L. Littleton and H. J. Everett, for appellant.

J. A. Pritchard, J. J. Rochford, C. Remster and P. W. Bartholomew, for appellee.

COMSTOCK, J.—The appellee brought this action against her husband, Sidney Brackett, and certain of his alleged debtors, charging that her husband had deserted her without just cause, and had refused to make any support for her and their infant child, aged eleven years, who was in her custody, alleging that \$25 a month is necessary for their support, and asking judgment against her husband in such sum as the court might deem just; and that his debtors be ordered to pay the sums owing him into court in satisfaction of the judgment allowed her. Appellant answered under oath that the present was one of many suits of a similar kind brought by plaintiff that had been tried and determined in his favor. Two other paragraphs of answer were filed, the one a general denial; the second alleging, substantially, that when he mar-

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ried appellee she was a widow having three children by a former marriage; that he had educated and cared for them; that they are now grown up men keeping house in Indianapolis; that appellee has, ever since their marriage, been cruel to appellant, cursing him and calling him vile names in the presence of their children; that she abandoned him several times without just cause for about a month at a time; that on such occasions she instituted various criminal suits to punish him for failure to support her, in which suits he was acquitted; that she frequently attempted to provoke him to do some act to enable her further to prosecute him; and that she enticed their youngest child to go with her for the sole purpose of enabling her to bring this suit. Other vexatious acts are charged, but we have set out enough to show the tenor of this paragraph. Appellant also filed a cross-complaint asking for a divorce from appellee upon the ground of habitual drunkenness and cruel treatment. Upon motion by appellee, the court struck out the cross-complaint. Upon the trial, the court rendered judgment in favor of appellee for \$200, and certain of the creditors were ordered to pay into court certain sums to be applied to the satisfaction of the judgment. Appellant's motion for a new trial was overruled.

The alleged errors will be considered in the order in which they are presented in appellant's brief. Appellant first discusses the action of the court in sustaining the motion to strike out the cross-complaint. It is insisted by appellee that this question is not presented for the reason that it is not incorporated in the bill of exceptions and is not made part of the record by order of court. It must be conceded that where a pleading is stricken out on motion, the same is not a part of the record, and can only be brought into the record by a bill of exceptions or by order of court. *Knowlton v. Dolan*, 151 Ind. 79; *Dudley v. Pigg*, 149 Ind. 363; *Hiatt v. Renk*, 64 Ind. 590. This claim of appellee must be sustained. The bill of exceptions does not contain the cross-complaint, nor the motion to strike it out. They are copied

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into the transcript, but they can not thus be made a part of the record.

The overruling of the motion for a new trial is next discussed. The motion sets out five reasons: (1) The damages assessed are excessive; (2) the decision of the court is not sustained by sufficient evidence; (3) it is contrary to law; (4) errors of law occurring at the trial and excepted to; (5) sustaining appellee's motion to strike out the cross-complaint. Considering these reasons in their inverse order, the fifth reason is not a cause for a new trial. Elliott's App. Proc. §348. The fourth reason does not specify any error of law. As to the third and second reasons, we deem it only necessary to say that there is evidence fairly to sustain the finding and judgment of the court. As to the first reason, appellant was steadily employed as a section boss upon a raliroad, receiving \$40 a month. He had in cash and at interest \$1,100. Upon the evidence we cannot say that the amount allowed is excessive. Appellant questions the form of the judgment, but made no motion to modify it. The judgment is for \$200 "as alimony." The statute provides, §6980 Burns 1894, §5135 Horner 1897, that the court shall make "an allowance in the nature of alimony." Had appellant desired that the judgment should have been applied to the relief of appellee's present needs, or that any modification should have been made in its form, he should have presented the question to the court by proper motion.

It is urged by appellee that the first, second, and third specifications in the assignment of errors depending for their consideration upon the evidence can not be considered for the reason that the evidence is not properly in the record. Without passing upon the question, let it suffice that we have read the evidence, passed upon all the questions discussed by appellant, and find no error for which the judgment of the trial court should be reversed. Judgment affirmed.

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UNITED STATES CAPSULE COMPANY v. ISAACS ET AL.

[No. 2,532. Filed December 20, 1899.]

ATTACHMENT.—Statute Must be Strictly Followed.—Attachment proceedings being purely statutory, the statutory provisions relative thereto must be strictly followed. *pp. 535, 536.*

SAME.—Affidavit.—An affidavit in attachment need not show that defendant has property subject to execution within the jurisdiction of the court. *p. 536.*

SAME.—Affidavit.—Nature of Plaintiff's Claim.—An affidavit in attachment which states that plaintiff's claim is for a balance due on a judgment in favor of the plaintiff, described in the complaint, and on account of goods sold and delivered, described in the complaint, sufficiently shows the nature of plaintiff's claim. *p. 537.*

SAME.—Affidavit.—Nature of Claim.—Reference May be Had to Complaint.—Where the statement of the plaintiff's claim in an affidavit in attachment shows that it is one for which an attachment may issue, but is not so full as might be desired, reference may be had to the complaint to ascertain the precise nature of the claim. *p. 538.*

APPEAL.—Brief.—Failure to Comply with Rule Requiring Reference to Pages of Record.—Where a record is voluminous, one waives his right to have a question considered on appeal when he fails to refer in his brief to the record pages where the proceedings complained of may be found, in accordance with rule twenty-two of this court. *p. 539.*

ATTACHMENT.—Answer.—Abatement.—Where the facts in an affidavit in an attachment are denied by an answer, such answer is in bar of the proceedings in attachment, and not in abatement of the writ. *p. 540.*

CORPORATIONS.—Consolidation.—Liability of New Corporations for Debts of Consolidating Companies.—Where a new corporation is formed out of old ones, and the assets of the old ones are turned over to it as a part of its assets, the new or consolidated corporation will be liable for the debts of the constituent corporations, to the extent of the property or assets thus acquired. *p. 544.*

SAME.—Action Against Consolidated Corporation for Debt of a Constituent Company.—Complaint.—In an action against a new corporation formed by consolidating several old ones, to recover a debt due from one of the consolidating corporations, it is not necessary to allege in the complaint, nor to prove on the trial, that the transfer of the stock to the new corporation was without consideration. *pp. 544, 545.*

From the Marion Superior Court. *Affirmed.*

U. S. Capsule Co. v. Isaacs.

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

Lucius B. Swift, for appellees.

WILEY, C. J.—The appellees, Solomon Isaacs, Emil Calmon and Gustav B. Calmon, under the firm name of S. Isaacs and Company, commenced their action in attachment against appellant. Their complaint was in three paragraphs. With the complaint an affidavit of attachment was filed, a writ duly issued and levied upon certain real estate. Counsel for appellant thereupon entered their special appearance and moved to quash the writ of attachment. This motion was based upon two reasons: (1) "Because it does not appear from the affidavit that there is property of the defendant within the jurisdiction of this court subject to execution;" and (2) "that the affidavit shows on its face that it is on the balance of a judgment against the National Capsule Company, and not against this defendant, and it fails to show that there is any cause of action against the defendant." This motion was overruled, and the motion, together with the ruling thereon, are brought into the record by bill of exceptions. Appellant then asked leave to enter its further special appearance and file its plea in abatement to the affidavit in attachment, which motion was overruled, and such motion and ruling thereon are also brought into the record by bill of exceptions. Appellant then entered its appearance and filed its plea in abatement to the affidavit in attachment, to which the original plaintiffs demurred, and the court sustained the same. Appellant then demurred to each paragraph of complaint, which demurrer was overruled and exceptions were reserved? Appellant then filed an answer to each paragraph of complaint, and to the attachment proceedings, in general denial. Appellee Groedel filed his complaint under the original action and the issue was joined thereto by answer in denial. Under the issues thus joined the case was tried by the court, resulting in a general

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finding and judgment for appellees for the several amounts found to be due them, and sustaining the attachment proceedings. Appellant's motion for a new trial was overruled, and on appeal it has assigned errors as follows: (1) The court erred in overruling the motion to quash the writ of attachment; (2) the court erred in overruling the motion for leave to appear specially and file a plea in abatement; (3) the court erred in sustaining the demurrer to appellant's plea in abatement; (4, 5, and 6) the court erred in overruling the demurrer to each paragraph of the complaint of Isaacs & Company; (7, 8, and 9) the court erred in overruling the motion for a new trial upon each of the issues submitted. We will consider the assigned errors in their order, in so far as it may be necessary to determine whether or not any of them are predicated upon reversible errors.

The affidavit in attachment, omitting the formal parts, is as follows: "Lucius B. Swift, being duly sworn, says that he is the plaintiffs' attorney in the above entitled cause, and on behalf of plaintiffs he says that the plaintiffs' claim in said action is on a balance of a judgment entered in cause No. 6956, in order-book 111, p. 489, in the circuit court of Marion county, Indiana, in cause No. 6956, Solomon Isaacs, et al., v. National Capsule Company, and described in the complaint in this action, and on account for goods sold and delivered, also described in said complaint; that affiant believes that the plaintiffs ought to recover thereon \$1,310.37, with interest, etc., and that the defendant is a non-resident of the State of Indiana." We have above noted the objections to the affidavit. Attachment is a statutory proceeding, and, as defined by Mr. Drake, is "A provisional remedy whereby a debtor's property, real and personal, or any interest therein capable of being taken under a levy and execution, is placed in the custody of the law to secure the interests of the creditor pending the determination of the cause." Drake on Attachment, §5; Elliott's Gen. Prac., §378. It is the well settled rule in this jurisdiction that, as

such proceedings are of purely statutory origin the statutory provisions relative thereto must be strictly followed. *Louisville, etc., R. Co. v. Parish*, 6 Ind. App. 89; Wade on Attachment, §§551-3, 733; 1 Am. & Eng. Ency. of Law, 894. The affidavit shows that appellant was a nonresident, and hence there existed a statutory cause for an attachment. §913 Horner 1897. Before an attachment writ can issue, it is necessary for the plaintiff to show by affidavit four things: (1) The nature of his claim; (2) that it is just; (3) the amount he believes he ought to recover; and (4) that there exists in the action one of the grounds for an attachment. The affidavit in this case clearly covers the last three requirements, for it is averred that the claim is just, the amount plaintiffs ought to recover, and that appellant is a nonresident. Appellant urges that the affidavit is defective because it does not show that the appellant had property within the jurisdiction of the court subject to execution, and says that it has been held that such averment is necessary, citing *Blair v. Smith*, 114 Ind. 114. In that case it is said in the syllabus that "an affidavit in attachment, which fails to show that the property sought to be reached is subject to execution, is not sufficient, and the proceedings may be quashed." This would seem to sustain appellant's position, but when we look to the body of the opinion, it is plain that the rule is not correctly stated. That was not a proceeding in attachment, under the statute cited, but a proceeding supplementary to execution. Upon the question there under discussion, Elliott, J., said: "No error was committed in quashing the attachment proceedings for the affidavit is insufficient. It is not shown in the affidavit, as the law requires, that the property sought to be reached was subject to execution," citing §819 R. S. 1881, being §831 Burns 1894. Continuing the court said: "It is only property subject to execution that a creditor can assert a claim against. If the property is not subject to execution, the debtor has an absolute right of disposition, with which creditors can not interfere. It is, therefore, no

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answer to the objection to aver that the property was fraudulently conveyed, for if it was not subject to execution, creditors cannot be heard to aver that the debtor made a fraudulent disposition of it." We can not believe that the Supreme Court, in the case just cited, intended to lay down as a general rule that, in attachment proceedings, it was essential to allege in the affidavit that property sought to be attached was subject to execution. The second and last objection urged to the affidavit is that the nature of the demand is not stated with sufficient certainty and definiteness to authorize the issuance of the writ, and because it affirmatively appears upon the face of the affidavit that there was no indebtedness from appellant to appellee existing. If appellant is right in this position, then the affidavit is insufficient, for, as we have seen, one of the essential elements of such an affidavit is to show "the nature of plaintiff's claim." This is one of the jurisdictional facts, and it must appear from the affidavit what the nature of the claim is, so that the court may determine if it is such a claim as will warrant the issuance of the writ. The nature of the claim, as described in the affidavit, is a judgment in favor of appellees against the "National Capsule Company and described in the complaint," and on "account of goods sold and delivered, also described in said complaint." We are inclined to the view that the affidavit is sufficiently definite in this respect. It shows the action is for the "recovery of money," and says that it is for a balance due on a judgment against the National Capsule Company, and for goods sold and delivered, "as described in the complaint", and it contains the further statement that the affiant "believes that the plaintiffs ought to recover thereon" a fixed amount.

In *Thierman v. Vahle*, 32 Ind. 400, the affidavit described the nature of the claim as "a balance due on account for goods sold and delivered," and the Supreme Court held it sufficient. Even if we wholly disregard that part of the affidavit relating to a judgment against the "National Cap-

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sule Company," still the "nature of the plaintiff's claim" is sufficiently described as being upon an account for goods sold and delivered. In *Fremont, etc., Co. v. Fulton*, 103 Ind. 393, 397, the affidavit described the nature of the plaintiff's claim as being for money due on three promissory notes, copies of which are filed with the complaint. It was held that the nature of the claim was sufficiently stated.

In the case before us, the record shows that the complaint and affidavit in attachment were filed at the same time. If there was any doubt as to the sufficiency of the affidavit when considered alone, such doubt is removed when we refer to the complaint, to which reference is made in the affidavit. While we do not find that the question has ever been directly decided in this State, yet there is good authority in the decisions of other courts of high standing for holding that we may look at the complaint in aid of the affidavit. Thus it was held in Nebraska that where the statement of the plaintiff's claim in the affidavit shows that it is one for which an attachment may issue, but is not so full as might be desired, reference may be had to the petition to ascertain the precise nature of the plaintiff's claim. *Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322. See, also, *Edick v. Green*, 38 Hun (N. Y.), 202.

We believe this to be the wholesome rule and founded in sound reason. By referring to the complaint, we find facts averred showing that the National Capsule Company, a corporation, purchased a large bill of goods from appellees, Isaacs and Company; that it did not pay for them; that suit was brought on the account and a judgment recovered; that said National Capsule Company consolidated with other companies; that the consolidated company assumed the name of the United States Capsule Company; that the consolidated company succeeded to the property of the National Capsule Company, consisting of machinery, real estate, etc., to the value of \$15,000 and in one paragraph of the complaint it was charged that the National

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Capsule Company placed in the possession of appellant a fund with which to pay the claim sued for in case such claim should be valid, etc. As to how far the consolidated company became liable for the debts of the constituent companies from which it was formed will more properly arise under another branch of the case, and need not now be further discussed.

This court held in *Fairbank v. Lorig*, 4 Ind. App. 451, that while the affidavit which is the basis of an attachment proceeding must show the facts required by statute, that where such affidavit is not so defective as to prejudice the substantial rights of the defendant, the writ of attachment will not be quashed. While the affidavit might have been more specific and have gone more into details as to the nature of the claim, yet we think it is sufficient, and we cannot believe that the substantial rights of appellant were prejudiced by the action of the court in overruling the motion to quash. We have examined all the authorities cited by appellant, but we do not think they sustain the contention that the affidavit was insufficient.

Appellant's second specification in its assignment of error challenges the action of the court in refusing leave to appear further specially and to file a plea in abatement to the proceedings in attachment. The record in this case is quite voluminous, and counsel for appellant have failed in their brief to refer us to the page, etc., of the record, showing where we may find the proceedings and order of the court of which they complain. In this regard, they have not complied with rule twenty-two of this court. Judge Elliott, in his work on Appellate Procedure, §440, says: "It is the duty of counsel to acquaint the court with the parts of the record of which an examination is desired. The court will not hunt through the record to discover the parts of it which counsel assume exhibit the rulings they desire considered." This is an inexorable rule and has been enforced in very many cases. *Evans v. Koons*, 10 Ind. App. 603; *Brunner*

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v. *Brennan*, 49 Ind. 98; *Martin v. Martin*, 74 Ind. 207. By this failure appellant has waived its right to have the question considered.

Appellant next discusses the sustaining of appellees' demurrer to its plea in abatement traversing the averments in the affidavit for attachment. In the pleading which appellant's learned counsel are pleased to call a plea in abatement to the affidavit in attachment there are three statements of fact made, as follows: (1) That appellant is a foreign corporation; (2) that it denies being indebted in any wise to appellees on the balance of the judgment described in the affidavit; and (3) that it denies being in any wise indebted to appellees on account of any judgment of any kind or character, or on account of goods sold and delivered. It is also averred that the facts set forth in the affidavit are not true. Upon these averments, the prayer is: "Wherefore the defendant prays that said cause of action abate and that the plaintiff be not further permitted to prosecute said action herein." Without deciding the question of practice as to whether or not a plea in abatement to an affidavit in attachment will lie, we are clearly of the opinion that the facts stated are not sufficient to make the plea good. At best, the facts pleaded amounted to nothing more than a general denial, and did not present a triable issue upon the affidavit in attachment alone. An attachment proceeding is not an independent one, as has often been held, but is merely incident to and in aid of the main action. True an issue should be formed as to the attachment proceedings, and in this case this was done by answer, and the issue thus formed, it must be tried, together with the issues in the principal or main action. *Foster v. Dryfus*, 16 Ind. 158; *Excelsior v. Lukens*, 38 Ind. 438. In the case last cited, it was held that where the facts in the affidavit are denied by an answer, that it is in bar of the proceedings in attachment and not in abatement of the writ. Further discussion of the question is unnecessary. The court did not err in sustaining the demurrer to the plea in abatement.

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Appellant's fourth, fifth, and sixth specifications of its assignment of errors, question the correctness of the overruling of its demurrer to the three paragraphs of complaint. A consideration of these questions necessitates a brief statement of the facts pleaded. In the first paragraph it is averred that the National Capsule Company purchased of the appellees' Isaacs & Company, gelatine; that it refused to pay for the same; that suit was brought on the account; that, during the pendency of the action, the National Capsule Company and other companies agreed to get up a new company, and turn all the assets of the several companies over to it; that, in pursuance of this arrangement, the United States Capsule Company was organized, and that, without any consideration, the assets of the National Capsule Company were turned over to it; that appellant has ever since been in possession of said assets, and is operating a factory in Detroit, Michigan; that the only property not turned over to appellant was 2,314 pounds of gelatine, and that the value of the property so turned over was \$15,000; that during all of said time appellant knew of appellees' claim and the pending action; that the National Capsule Company turned over its factory in Indianapolis; that appellant closed it, and has not operated it since; that the National Capsule Company ceased to do business, and its president and manager became president and manager of the appellant corporation; that the National Capsule Company made no provision for the payment of its debts, and has not since such transfer had any assets subject to execution out of which they could be made; that appellees, Isaacs & Company, recovered judgment against the National Capsule Company; levied upon said gelatine, which was sold, and the proceeds applied thereon, leaving a balance due of \$1,310.37; that before the action was commenced demand was made upon appellant for payment. The second paragraph is like the first, with the additional averment that when the National Capsule Company turned its property and assets over to appellant, the former placed with the

latter a fund with which to pay appellees' judgment, if such judgment should be recovered. The third paragraph does not set out a judgment, but avers that appellees sold to the National Capsule Company certain goods, etc.; that said company transferred its property and assets to appellant, without consideration, leaving no property subject to execution with which to pay its debts. Appellant claims that these several paragraphs are defective, and that neither of them states a cause of action against it. It is first urged that there is no averment that appellant assumed or agreed to pay the obligations of the National Capsule Company, and that there is no implied assumption to that effect. If it was necessary to aver such assumption, and there is no implied assumption, then neither paragraph is good. The question rests, it seems to us, upon a correct solution of the following inquiry, viz.: "Did the appellant, as a consolidated corporation, under the facts pleaded, become liable for the debts of the constituent companies out of which it was formed, and of which the National Capsule Company was one?" Appellant concedes that where municipal or public corporations are merged by consolidation, thus forming a new one, the old ones going out of existence, the consolidated corporation succeeds to all the property, rights, etc., of the old ones, and becomes answerable for all their liabilities in the absence of any arrangement to the contrary, citing *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465.

It is contended, however, that this doctrine does not apply to private or manufacturing corporations. Our attention is called in argument to four cases in support of this proposition, viz.: *Treadwell v. Salisbury Mfg. Co.* 7 Gray 393; *Sargent v. Webster*, 13 Met. 501; *H. & G. M. Co. v. H. & W. M. Co.*, 127 N. Y. 252, 27 N. E. 831; *Howe v. Boston Carpet Co.*, 16 Gray 493. We have examined all these cases and find that in neither of them the question we have under consideration was presented. Those cases involved the right of private corporations to close up their

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business and dispose of their stock, etc., by direction of their directors, and in this respect made a distinction between private and public corporations, holding that in private corporations neither the public nor legislatures have any direct interest in their business or the management of their affairs. These cases, therefore, are not authority here. Counsel say that the rule of law which holds that a consolidated public corporation is liable for the debts of its constituent corporations out of which it is formed is not applicable to private or manufacturing corporations, and that no authority can be found in support of the proposition. Let us see what Mr. Cook on Corporations says: "This new consolidated corporation usually succeeds to the rights and takes the property subject to all the obligations of the old companies." Cook on Corporations, (4th ed.), §897, where many authorities are cited. Mr. Thompson, in his commentaries on the law of corporations, Vol. 7, §8241, says: "The consolidation of two or more corporations is like the uniting of two or more rivers; neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist, though in a different form. A new corporation is formed, but not in the sense which works a destruction of the rights of action existing against the old one. Independently of statute, the better view is that the new one is liable for any debts, obligations, or rights of action of any kind existing in favor of third persons at the time of the consolidation, and may be sued at law or in equity to enforce such rights and obligations, without any agreement to become so answerable, and without any statute imposing the liability. The consolidated corporation is answerable in a direct action for the * * * contracts of the constituent corporations; may be compelled specifically to perform their contracts * * *. In short, an obligation imposed by charter or statutes upon one of the constituent companies, reads itself into the charter of the consolidated company and becomes a part of its being." The rule as laid down

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by the textwriters may be briefly stated as follows: Where a new corporation is formed out of old ones, and the assets of the old ones are turned over to it as a part of its assets, the new or consolidated corporation will be liable for the debts of its constituent corporations to the extent of the property or assets thus acquired, and a creditor may sue the consolidated corporation, reduce his debt to a judgment, and may have execution issue thereon for its collection. See Hirschl on Combination, Consolidation and Succession of Corporations, pp. 296-300. *Hibernia Ins. Co. v. St. Louis, etc., Co.*, 13 Fed. 516; *Breen v. Merchants Mutual Ins. Co.*, 16 Fed. 140; *Hibernia Ins. Co. v. St. Louis, etc., Co.*, 10 Fed. 596; Taylor Private Corporations, §657; *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48. See, also, *Chicago, etc., R. Co. v. Bank*, 134 U. S. 276.

Appellant argues that the second paragraph of the complaint is not strengthened by the averment that the National Capsule Company placed in the hands of appellant a fund with which to pay appellees' claim, if it should be successfully established, and that in such paragraph appellees have mistaken their remedy, because such remedy would be by a proceeding supplementary to execution, or by garnishment. From what we have said as to the first paragraph, the second would be good without such averment, for, as we have seen, the two paragraphs are alike except the additional averment in the second to which we have just referred. As to whether the paragraph is good upon the theory that appellees may recover as for money had and received, we need not decide. For the reasons given, we must also hold the third paragraph good.

The next question discussed is the overruling of appellant's motion for a new trial upon the issues formed upon the affidavit in attachment. The reasons assigned for this motion were that the decision was contrary to the law and the evidence, was not sustained by sufficient evidence, and that the

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court erred in admitting in evidence the affidavit and the writ of attachment. Much that we have said in passing upon the question arising upon the overruling of the motion to quash the writ is applicable here, and need not be repeated. The finding of the court upon the issues joined in the attachment proceedings is fully supported by the evidence. In discussing the alleged error of the court in admitting in evidence the affidavit and writ of attachment, appellant has failed to call our attention to the page and line of the record where the evidence may be found. In their brief they have not stated the reasons they assigned in support of their objection to the admission of this evidence, and under the rule above stated, we are not required to run through the whole record of evidence, covering about 200 pages, to find if proper objections were made, and exceptions reserved, and thus determine the question we are asked to consider. For the same reason, we can not consider the question of alleged errors assigned in the motion for a new trial upon the merits, arising upon the the admission of certain evidence referred to. Upon the general proposition that the finding of the court is not sustained by sufficient evidence, we have examined the evidence as a whole, and have reached the conclusion that it is amply sufficient to support the finding and judgment. The only evidence in the record is that introduced by the appellees. Every material averment of the complaint is supported by the evidence, except the one that charges that the transfer of the property, etc., of the National Capsule Company to appellant was without consideration. The evidence shows that the latter received from the former, under the agreement of consolidation, property, etc., appraised and valued at \$51,000, and that appellant issued to the National Capsule Company its capital stock in the sum of \$20,000. It appears from this that appellant received from the National Capsule Company property, etc. of the value of \$31,000 in excess of the amount paid. From our view of the law, as herein expressed, and which we think

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is fully sustained by the authorities, the averment that the transfer of the property of the National Capsule Company to appellant was without consideration was not a necessary averment, and a failure to prove it as alleged was not fatal to appellees' right to recover.

Appellees, with their complaint, submitted interrogatories to appellant to be answered under oath. These interrogatories and answers were introduced in evidence, and from the answers it appears that the National Capsule Company paid to appellant \$3,500 to be paid to appellees, Isaacs & Company, and Groedel, in case they recovered judgment. It is also shown by an answer that Isaacs did recover a judgment for about \$3,000, which has been paid, and that a balance of \$429.50 of the \$3,500 still remained in the hands of appellant. If this were all the evidence on this point, it would seem that the claim of Isaacs & Company had been fully paid, but it is shown by the record that the original judgment in favor of Isaacs & Co., was only for \$1,646.53, and it also appears that the \$3,000 shown to have been paid by appellant, by its answers to interrogatories, was paid on a judgment against one Robert McCutchen, who became indorser for the National Capsule Company. McCutchen was the president of such company, and upon the consolidation became president of appellant. The amount so paid was paid some three or four months before this action was tried. Mr. Stevens, general manager of appellant, testified that at the time of the trial, appellant had in its hands \$3,500 or \$3,600 belonging to the National Capsule Company, "awaiting the results of Isaacs and Groedel." He said: "It is a fund that we have reserved to meet these two cases." It was further shown by the evidence of Stevens that that money was in Detroit in the hands of appellant, and that the money could be had at any time it was wanted. From these facts, it is clear that the money paid on the McCutchen judgment in New York had no connection with or relation to the special fund set aside for the payment of the claims of

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Isaacs and Groedel. Appellant further complains that it is not shown that all the remaining assets of the National Capsule Company have been exhausted. We think otherwise. The evidence shows that all the property of the National Capsule Company subject to execution had been exhausted. The same questions are presented in the motion for a new trial upon the issues joined in the action of Groedel against appellant, and by agreement of the parties the evidence in behalf of Isaacs & Company is to be considered in so far as it is applicable to the issues joined upon the complaint of Groedel. As the same questions are presented in the two cases, further discussion is unnecessary.

From the entire record, we conclude that a correct result was reached by the trial court, and that there was no error to work a reversal. Judgment affirmed.

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[No. 2,877. Filed December 20, 1899.]

APPEAL.—Conflicting Evidence.—The Appellate Court will not determine the preponderance of conflicting evidence. *p. 548.*

FRAUD.—Evidence.—Presumption of Good Faith.—In an action to recover personal property alleged to have been procured by the defendant through fraud, where the facts relied on to show fraud are consistent with either good or bad faith, the presumption of good faith will prevail. *pp. 548, 549.*

From the Elkhart Circuit Court. *Affirmed.*

J. M. Van Fleet and *V. W. Van Fleet*, for appellants.

O. T. Chamberlain and *P. L. Turner*, for appellees.

ROBINSON, J.—Suit by appellants in replevin, based upon the theory that Reed purchased goods of them intending never to pay for them, and sold them to his co-appellee Bryson, who was not an innocent purchaser. Judgment against Reed and in favor of Bryson. Appellants' motion for a new trial overruled.

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If appellee Bryson was a good faith purchaser of the property in controversy, the judgment of the trial court was right. This was a question of fact to be determined from all the evidence. There was some conflict in the evidence as to some of the material facts. There were many facts and circumstances introduced in evidence which the court could properly consider in determining whether Reed sold the goods with a fraudulent intent, and if such fraudulent intent existed, whether Bryson had knowledge of it. The inference to be drawn from these facts and circumstances was for the trial court. There are circumstances disclosed bearing upon the question that Bryson had knowledge of facts and circumstances sufficient to put a man of ordinary prudence upon inquiry, but there is no direct evidence that Bryson bought the property with knowledge that Reed had practiced any fraud, and Bryson testified that he had no idea of Reed's indebtedness at the time he bought the goods, that he did not buy them for the purpose of assisting Reed to beat his creditors or to hinder or delay them in any way, and that he had no idea Reed had any such intention. Whether after hearing and weighing the evidence this court would have reached a conclusion different from that reached by the trial court is not the question. The fact that different persons might reach different conclusions is not sufficient reason for setting aside the court's finding. The question presented is not one of law but is purely one of fact, and the long settled rule that we can not disturb a finding upon the weight of the evidence is clearly applicable.

The evidence in the case at bar is the same as that in the case of *American Varnish Co. v. Reed*, (Ind. Sup.) 55 N. E. 224, wherein it was sought to set aside as fraudulent certain sales of property by appellee Reed. That case reaffirms the doctrine long declared in this State, that, as the presumption is always in favor of honesty and fair dealing and against bad faith, fraud is a question of fact which must be proved and can not be presumed; and that in such cases there is no

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such thing as fraud in law; and that if facts are consistent with either good or bad faith, the presumption of good faith will prevail. Citing the following: *National Bank v. Dove-tail, etc., Co.*, 143 Ind. 550; *Bruner, Rec., v. Brown*, 139 Ind. 600; *Rockland Co. v. Summerville*, 139 Ind. 695; *Fulp v. Beaver*, 136 Ind. 319; *Hutchinson, Assignee, v. Bank*, 133 Ind. 271; *Bank v. Findley*, 131 Ind. 225; *Coal Co. v. Terre Haute, etc., Co.*, 129 Ind. 73; *Cicero Tp. v. Picken*, 122 Ind. 260; *Wallace v. Mattice*, 118 Ind. 59; *Phelps v. Smith*, 116 Ind. 387; *Stix v. Sadler*, 109 Ind. 254; *Caldwell v. Boyd*, 109 Ind. 447; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Rose v. Colter*, 76 Ind. 590; *Morgan v. Olvey*, 53 Ind. 6; *Stewart v. English*, 6 Ind. 176; *Bradish v. Bliss*, 35 Vt. 326; Wait on Fraudulent Con. §§5, 6; 2 Thompson's Trials, §§1938, 1940. In the case at bar there is evidence to sustain the court's conclusion that Bryson was a good faith purchaser for value. Judgment affirmed.

FRANKLIN INSURANCE COMPANY v. WOLFF.

[No. 2,800. Filed Oct. 6, 1899. Rehearing denied Dec. 20, 1899.]

INSURANCE.—Action by Mortgagee on Fire Policy.—Pleading.—A mortgagee to whom a fire policy is payable may, where the mortgage debt exceeds the amount of the policy, prosecute an action on the policy in his own name, if the insured is made a party defendant. *p. 550.*

PLEADING.—Answer.—Joint Demurrer.—A demurrer stating that "plaintiff demurs to the second and third paragraphs of defendant's answer, on the ground that said paragraphs do not state facts sufficient," etc., is a joint demurrer; and if one of the paragraphs is good the demurrer must be overruled as to the other. *pp. 552, 553.*

INSURANCE.—Rights of Mortgagee to Whom Insurance is Payable.—A mortgagee to whom a loss is payable as his interest may appear is not an assignee of the policy in the sense that a new contract of indemnity is created with the insurer. Such mortgagee is therefore bound by a clause in the policy prohibiting other insurance of the property by the insured. *pp. 553-557.*

SAME.—Assignment of Void Fire Policy.—Rights of Assignee.—The rule of law that the assignment of a fire policy by consent of the

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insurer makes a new contract, and that defenses available against the assignor cannot be pleaded against the assignee is not applicable to a policy void in its inception. *p. 557.*

From the LaPorte Superior Court. *Reversed.*

James F. Gallaher, for appellant.

C. R. Collins and *J. B. Collins*, for appellee.

ROBINSON, J.—Appellant issued a fire policy on certain property to Harry B. Tuthill who afterwards conveyed it to one Haney and indorsed the policy to him; Haney then mortgaged the property to appellee, and with appellant's consent the policy was made payable to appellee in case of loss. The property burned, and the mortgagee, appellee, sued, making appellant and the mortgagor defendants.

The two paragraphs of complaint are alike except one avers that proof of loss was made, and the other that it was waived by appellant's denying liability. The first question presented is whether the mortgagee may sue. From the complaint it appears that the mortgage debt then owing exceeds the amount named in the policy. It thus appears that the mortgagee is entitled to receive the benefits of the suit, and that he is the real party in interest, and as such the suit may be prosecuted in his own name. §251 Burns 1894.

In *Home Ins. Co. v. Gilman*, 112 Ind. 7, the owner of the property and mortgagee joined in a suit for a fire loss. The amount of the loss exceeded the mortgage debt. In holding that they might join in the action the court said: "It was the interest of each that the other should recover, as well as that he should recover himself. A recovery by the mortgagee inured to the benefit of his co-plaintiff, in that it established a common right. The amount recovered by the mortgagee went in liquidation of the mortgagor's debt, while a recovery by the latter had a like effect upon the common right, and entitled the former to receive payment out of the sum recovered as his interest in the fund might appear. Each was, therefore, interested in the relief sought by the other, and

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as both appeared upon the face of the policy to have a common interest, neither being entitled to the whole fund, it was proper for the protection of the defendant that both should be parties. 'It was not so material whether they were plaintiffs or defendants, so that their rights under the contract would be barred by the event of the suit.' "

In the case at bar the insurer had contracted with the insured, and, upon certain contingencies, agreed to pay the loss to a third person. We see no reason for denying him the right to maintain an action on such promise in his own name when he shows he is entitled to recover the full amount of insurance. His debt exceeds the amount of insurance. Nothing is due the insured. The insured is a necessary party, but under the facts pleaded it is not material whether he is joined as plaintiff or made a defendant. He is made a party to answer as to his interest, and whatever rights he may have will be barred by the event of the suit. See *Hammel v. Queen's Ins. Co.*, 50 Wis. 240; *Maxcy v. New Hampshire Ins. Co.*, 54 Minn. 272; *Bartlett v. Iowa, etc., Ins. Co.*, 77 Iowa 86; *Tilley v. Connecticut Ins. Co.*, 86 Va. 811; *Molley v. Manufacturers Ins. Co.*, 29 Me. 337; May, Insurance, §449; Ostrander on Fire Ins., (2nd ed.), p. 355; Beach on Ins., §1285; Joyce on Ins., §3612; 1 Jones Mortgages, §408.

It is clear that in the case at bar the owner and the mortgagee could have joined as plaintiffs. Appellant has not shown in what way it has been harmed, or could be harmed, by permitting the mortgagee to sue alone, making the owner a defendant. A party asking a reversal must show the ruling to have been such as was or might have been harmful to him. *Louisville, etc., R. Co. v. Lange*, 13 Ind. App. 337.

In the case of *Aetna, etc., Ins. Co. v. Baker*, 71 Ind. 102, Baker owned the property insured, on which was a mortgage to Ellsworth, who procured a policy of insurance on her interest as mortgagee, loss payable to her. It was shown by

the facts that Baker was the equitable assignee of the policy, and as such it was held the suit was properly prosecuted in his name.

There was no error in overruling the demurrer to the complaint.

The defendant Haney answered admitting the facts averred in the complaint to be true, and disclaiming any interest in the policy sued on.

Appellant company answered in denial, and special answers in a second and third paragraph. The second paragraph pleaded subsequent additional insurance by Haney without appellant's consent, and a tender of the premium paid appellant. The third paragraph alleged that when the policy was issued to Tuthill he did not own the property in fee nor was he such owner when he assigned the policy to Haney, nor did Haney when the policy was assigned, nor when the mortgage was given, own the property in fee, of which facts appellant had no knowledge; also pleading a tender of the premium paid.

To these answers the following demurrer was filed. "The plaintiff demurs to the second and third paragraphs of the defendant the Franklin Insurance Company's answers on the ground that the said paragraphs do not state facts sufficient to constitute a defense to plaintiff's complaint." This demurrer was sustained as to the second, and overruled as to the third paragraph. The demurrer is a joint demurrer. *Gilmore v. Ward*, 22 Ind. App. 106; *Stanford v. Davis*, 54 Ind. 45; *Meyer v. Bohlfig*, 44 Ind. 238; *Washington Tp. v. Bonney*, 45 Ind. 77; *Cooper v. Hayes*, 96 Ind. 386.

It is argued that the error assigned on this ruling that "The court erred in sustaining appellee's demurrer to the second paragraph of the answer of this appellant," presents no question. The assignment corresponds with the ruling. The court ruled as though the demurrer was several, and it is on this ruling the error is predicated.

In *Colles v. Lake Cities Electric R. Co.*, 22 Ind. App.

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86, a joint demurrer addressed to a third and fourth paragraph of answer was overruled, and it was held that no question was presented by an assignment of error that "the court erred in overruling appellant's demurrer to the third paragraph of appellee's answer," and that "the court erred in overruling appellant's demurrer to the fourth paragraph of appellee's answer." The reason given is that the court made no such ruling as was assigned as error. The ruling was joint and the error assigned must correspond. But in the case at bar the ruling was several and on this the error must be predicated.

The demurrer being joint, the answers must all stand or fall together. It is insisted by appellant that both answers are good.

The policy contained the provision that "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not on property covered in whole or in part by this policy." The second paragraph pleads a violation of this condition by Haney to whom the policy was assigned by Tuthill, and by whom the mortgage was given to appellee. It is argued by appellant that if Haney had sued in his own behalf this answer would prevent his recovery, and that appellee occupies no better position than Haney would.

It is well settled that a contract of insurance is personal, and does not run with the property insured. The insurer agrees to indemnify the person insured against the loss of his property by fire. *Nordyke, etc., Co. v. Gery*, 112 Ind. 535, 5 Am. St. 271.

In *Continental Ins. Co. v. Munns*, 120 Ind. 30, the court said: "It is abundantly settled that upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of indemnity arises between the insurance company and the assignee, which the

latter may enforce without regard to what may have occurred prior to the assignment. The policy, it is said, in such a case, expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed."

The reason underlying the above well settled rule is that the assignor, upon the assignment, entirely ceases to be a party to the contract. He has disposed of all his interest. The company can be liable to him in no event. It needs no protection from the hazard of over-insurance or encumbrances so far as he is concerned. If there is a loss he can have no interest whatever in a suit for its collection. A new contract has been made and with its enforcement he has nothing to do.

But a mortgagee, to whom a loss is payable as his interest may appear, is not an assignee in the above sense. The contract is still between the company and the mortgagor. It is the mortgagor's interest that is insured. He has not ceased to be a party to the original contract. If the property burns it is his loss, not the mortgagee's. The effect of the mortgage clause is that the company agrees, if money becomes due the mortgagor under the contract, to pay it to the mortgagee instead of paying it to the mortgagor himself. If such a clause is an assignment the assignor's interest is gone, but when there is a loss there may be no mortgage debt. While the doctrine declared in the Munns case is clearly the law, it does not apply to the case at bar. The contract which the mortgagee seeks to enforce is between the insurer and the mortgagor, and to establish his right to recover he must necessarily show that the mortgagor has performed his part of the contract. If he has done some act which avoids the insurance both his and the mortgagee's right to recover is cut off. The mortgagee can recover only in case the mort-

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gagor could have done so. See *Palmer Savings Bank v. Insurance Co.*, 166 Mass. 189, 44 N. E. 211; *Sun Fire, etc. v. Clark*, 53 Ohio St. 414, 42 N. E. 248; *May Insurance*, §§272, 273; 1 *Jones Mortgages*, §406; *Froehly v. Insurance Co.*, 32 Mo. App. 302.

The paragraph of answer alleges that after the issuance of the policy "Haney entered into and procured another contract of insurance in another company and on the same property" without the consent of, or notice of any kind to, appellant. The policy provides that additional insurance avoids the contract, and if it was avoided by such insurance it was avoided when the insurance was taken, and it is held that it is immaterial whether the new policy was still in force when the loss occurred or not. *Replogle v. American Ins. Co.*, 132 Ind. 360.

It is true in the case at bar the policy contains two provisions concerning a mortgagee which must be construed together. One of these reads: "Loss, if any, under this policy payable to Charles Wolff, mortgagee, as his interest may appear." This is signed by the agent who signed the policy and bears date subsequent to date of policy. The other provision contained in the main body of the policy is: "If with the consent of this company an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or appended hereto."

These provisions have been construed by the supreme courts of Illinois and Nebraska, in *Queen Ins. Co. v. Dearborn, etc., Assn.*, 175 Ill. 115, 51 N. E. 717; and *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717. In those cases it is held that under these provisions the mortgagee's rights under the policy are affected by conditions

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expressed in the policy only where there was written upon, attached, or appended to the policy some provision or condition rendering such conditions of the policy applicable and defining the manner of their applicability; and that if the clause contained no such provision, the mortgagee might recover to the extent of his interest, regardless of acts of the owner which might as between him and the insurer defeat a recovery.

These cases are based upon the premise that there exists between the insurer and the mortgagee a contract of insurance distinct from that which existed between the company and the owner. With this we can not agree. There is no consideration moving from the mortgagee to the insurer. The company's obligation is to the mortgagor. Under certain conditions the mortgagee acquires an interest, but the arrangement to pay the mortgagee is not of the essence of the company's obligation. If a new contract was executed, the old one ceased to exist. The mortgagee's rights under the policy are conditional. It is so stated in the mortgage clause. If these conditions cease to exist his rights go with them. He may cease to have any rights under the policy, and all rights be in the mortgagor, and this without the knowledge or consent of the insurer. If a new contract has been made with the mortgagee, this could not be done. Following the reasoning of those cases to its logical conclusion, mortgagees might enforce their demands under policies regardless of the amount of over-insurance contracted for by the owner and mortgagor. As we construe the policy in suit the mortgagee's interest is not protected by the terms of the policy against any acts of the mortgagor. See, also, *Coates v. Pennsylvania Ins. Co.*, 58 Md. 172, 48 Am. Rep. 327; *Jackson v. Farmers, etc., Ins. Co.*, 5 Gray (Mass.) 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 568; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Martin v. Franklin Ins. Co.*, 38 N. J. L. 140; *Bank v. Pennsylvania Ins. Co.*, 122 Mass. 165; 2 Wood, Fire Ins. p. 370; Ostrander on Fire Ins. (2nd ed.), p. 339; Joyce Ins., §2320.

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The better reasoning leads to the conclusion that a defense of subsequent additional insurance against the insured is good against his mortgagee. In the absence of a stipulation in the policy protecting the mortgagee against the acts or default of any person other than himself or agent, he can have no better right to recover than his mortgagor would have had. The second paragraph of answer is good against a demurrer, and sustaining the demurrer to this paragraph was error.

The third paragraph of reply to the third paragraph of answer admits that when the policy was issued Tuthill was not the owner of the legal title to the property insured; that the policy was issued January 30, 1895, to run three years; that afterwards, February 26, 1896, Tuthill conveyed the property by warranty deed and for valuable consideration to Haney, and on the same day appellant assented to the assignment of the policy and to the mortgage clause; that appellant, when the policy was first issued, knew that Tuthill was not the owner of the legal title to the property, and knew that fact when the policy was assigned to Haney. The complaint averred Tuthill was the owner, and the policy filed as an exhibit required the insured to be the owner in fee simple.

The assignment of the policy, with the company's consent, to Haney made a new contract between him and the company, and defenses available against the assignor could not be pleaded against the assignee. *Continental Ins. Co. v. Munns*, 120 Ind. 30. But this rule should not be extended to a policy void in its inception. If the policy was void when issued because the insured had no insurable interest, it can not be said that a subsequent assent to an assignment made it valid. The reply admits that Tuthill was not the owner of the legal title to the property, and fails to allege that he had any insurable interest, or that he had any interest. As a reply to an answer alleging that he was not the owner, it was bad against a demurrer. Judgment reversed.

Henley, J., absent.

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MUNCIE PULP COMPANY v. MARTIN ET UX.

[No. 2,957. Filed December 21, 1899.]

WATERS AND WATER COURSES.—Pollution.—Damages.—Complaint.

—Where a complaint for the recovery of damages for injury to the property of plaintiff resulting from the pollution of a stream charged defendant with continuously emptying into the stream from its pulp factory, located on the stream above plaintiff's farm, refuse from the mill, containing acids and other unwholesome ingredients, rendering several acres of the farm and the water in the stream unfit for use, and destroying the timber, it was not necessary to allege that the use defendant made of the stream in carrying on its business of manufacturing pulp was unreasonable or unnecessary. pp. 558-562.

DAMAGES.—Instructions.—Where, in an action for damages to farm land caused by the pollution of a stream, an instruction was given at the request of defendant limiting the measure of damages to the difference between the rental value of the farm as it was with the polluted stream and as it would have been if the stream had not been polluted, and such additional damages as resulted from the destruction of timber, a verdict will not be set aside as excessive, where it is not manifest from the special findings that the jury did not keep within the rule laid down in the instruction as to the measure of damage. pp. 563, 564.

From the Delaware Circuit Court. *Affirmed.*

Ferdinand Winter, J. W. Ryan and W. A. Thompson,
for appellant.

R. S. Gregory, O. J. Lotz, A. C. Silverburg and R. C. Griffith, for appellees.

BLACK, J.—The appellant has questioned the sufficiency on demurrer of the first paragraph of the appellees' complaint. There were two paragraphs, each for the recovery of damages for injury to the property of the appellees through the pollution of a certain stream called Buck creek, which flowed through the farm of the appellees, the complaint charging the appellant with continuously emptying into the stream from its pulp factory, located on the stream

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above said farm, the refuse from the mill, containing acids and other unwholesome ingredients, the sediment from which had accumulated and filled up the channel of the creek, and had spread over the lands of the appellees, rendering several acres untenable and unfit for use, and had destroyed the growing timber upon about fifteen acres, and had rendered the water of the creek unfit for use for watering stock and other farm uses, and had made the lands of the appellees practically worthless and unmarketable, all to the damage of the appellees in a specified sum.

The trial involved both paragraphs of the complaint, the second much more elaborate than the first, and such defenses as might be shown under the general denial. There was a general verdict for the appellees for \$2,000, and the jury returned special findings in answer to interrogatories.

The only objection urged to the first paragraph of complaint is that it was not alleged that the use which the appellant made of the stream in carrying on its business of manufacturing wood-pulp was "unreasonable or unnecessary."

If water coming to the plaintiff's premises is impaired in value for the ordinary uses of life, or for special lawful uses, by reason of any foreign substance imparted thereto by another from artificial causes, there is a nuisance, and the burden of establishing both these propositions is upon the plaintiff; "but when once established, the nuisance is made out, and the right of recovery can not be defeated otherwise than by the establishing of a right by grant or prescription, or by express license from the plaintiff. The usefulness of the works, their absolute necessity, nor the fact that they can not be carried on without producing the result in question, nor the fact that the highest degree of care and skill is exercised to prevent injury, will be no excuse." Wood on Nuisances, §436.

No doubt, merely slight injury to the water of a stream by pollution, which results from a reasonable use of it, is not actionable; but pollution, which substantially impairs its

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value for the ordinary uses of life, or renders it to a measurable degree unfit for domestic purposes, or which, by causing offensive or unwholesome odors or vapors to arise, impairs the comfortable or the beneficial enjoyment of property in its vicinity, is a nuisance, and as such is actionable.

The maintenance of the nuisance in this case being a positive aggressive wrong, the question of negligence is not involved in an action for damages thereby caused. *City of Lebanon v. Twiford*, 13 Ind. App. 384; *Williamson v. Yingling*, 80 Ind. 379.

The case before us is not one wherein the defendant is charged with making some lawful natural use of his real property, or one wherein he is charged with producing damage by an occasional or temporary action in the preparation or adaptation by necessary and usual means of his real property for a lawful use; but it is one wherein he is charged with continuously doing that which diminishes the lawful use of the property of the plaintiffs, and thereby injures them materially, the injurious acts not pertaining to the development or use of the natural resources of the defendant's real property.

The necessary results of conducting a lawful business may constitute a nuisance, and there may be a recovery of damages to the extent of the sensible injury caused thereby, because one must so use his own as not to injure another. See *St. Helen's, etc., Co. v. Tipping*, 11 H. of L. Cas. 642; *Tipping v. St. Helen's, etc., Co.*, 4 Best & S. 608, 116 Eng. Com. L. 608, 616.

The case of *West Cumberland, etc., Co. v. Kenyon*, L. R. 11 Ch. D. 782, is said in *Garrett on Nuisances*, 119, to be a decision of little value, inasmuch as the court, in effect, found that the operations of the defendant had cast no additional burden on the plaintiff, and that, therefore, the latter had no cause of action; and a passage from the judgment of James, L. J., is quoted as instructive, of which the following is a part: "I have always understood that everybody has a

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right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbor's land so as to affect that neighbor's land in some other way than the way in which it had been affected before."

In *Wood v. Waud*, 3 Exch. 746, 780, it was said, per Pollock, C. B.: "As the establishment of a manufacture rendering the air sensibly impure, by emitting noxious gases, would be actionable, so would it be if it rendered the water less pure by the admixture of noxious substances."

In *Banford v. Turnley*, L. J. 31, Q. B. (N. S.) 286, it was held that where a man by an act on his own land, such as burning bricks, causes so much annoyance to his neighbors as to amount, *prima facie*, to a legal nuisance, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. See, also, *Stockport Waterworks Co. v. Potter*, 7 H. & N. 159.

In *Boston, etc., Co. v. Hills*, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844, in holding that the tenant of one story of a building used for manufacturing purposes might restrain the tenant of the next story above, in the floor of which there were holes for the passage of the belting by which the machinery of both tenants was run, from allowing sand and acids used in the business of the tenant of the upper story, and the fumes of the acids, to come through the holes in the floor and injure the machinery and goods of the tenant of the lower story, it was said, per Holmes, J., that "there would be no need to allege in terms that the business was unsuitable to be carried on in that place, or that there was negligence in the mode of carrying it on; that as the damage was the manifest consequence of the defendants' business, the fact that they could not help it if they carried on the business would be immaterial. * * * The discharge of

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acid fumes upon neighboring land in sufficient quantities to do substantial harm is deemed so clearly beyond the limit of reasonable use of a man's premises that courts have held as matter of law that it is actionable." It was further said: "If there are any special reasons why the defendants should be allowed to do what they do, they should be alleged in the answer. The question before us is whether there is a general right to invade lower premises with acid fumes and sand, in the mode described, in a manufacturing building, if the aggressor finds it necessary for his business. We are not prepared to admit the existence of such a right."

In this State it is provided by statute that whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action, which may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance; and that where a proper case is made, the nuisance may be enjoined or abated, and damages may be recovered therefor. §§290-292 Burns 1894, §§289-291 Horner 1897.

The remedy sought and afforded in the case before us is the recovery of damages, which will be allowed for many injuries and inconveniences when relief by the severe process of injunction would not be granted. We, however, express no opinion further than that the facts stated in the complaint were sufficient in an action for damages. See *Langsdale v. Bonton*, 12 Ind. 467; *Smith v. Fitzgerald*, 24 Ind. 316; *Ohio, etc., R. Co. v. Simon*, 40 Ind. 278; *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189; *Moses v. State*, 58 Ind. 185; *Haag v. Board, etc.*, 60 Ind. 511, 28 Am. Rep. 654; *Owen v. Phillips*, 73 Ind. 284, 291; *Hebron, etc., Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Reichert v. Geers*, 98 Ind. 73, 49 Am. Rep. 736; *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep. 304; *Haggart v. Stehlin*, 137 Ind. 43, 22 L. R. A. 577.

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Under the appellant's motion for a new trial and its motion to modify the judgment, it is contended for the appellant that the damages were excessive. In the discussion of this question counsel have not relied upon the evidence, but have based the claim upon answers of the jury to some of the interrogatories submitted by the appellant.

Among the instructions was one given at the request of the appellant limiting the measure of damages to the difference between the rental value of the farm of the appellees for each year from January 22, 1894 (the date at which the appellees became the owners of the farm), to September 2, 1897 (the date of the commencement of the action), as it was during each year, and what the rental value would have been per year for that time if the refuse of the appellant's plant had not been turned into the stream, and such additional damages as resulted from the destruction of timber.

The appellees occupied their farm during the period in question, and it is manifest that the expression "rental value" was intended by the court and the parties and understood by the jury to be equivalent to the value of the use of the farm.

It is claimed, however, that the jury besides awarding the value of certain timber trees which they found to have been destroyed and rendered worthless, and the rental value of the land, also included in the amount of the general verdict damages for other injuries. There is apparent confusion in the special findings, which may have been occasioned by the form of the interrogatories and a change in their form as they progressed upon the subject of damages. But the special findings relating to the damages, other than those relating to the timber, are capable of being construed as intended by the jury to relate only to depreciation in the value of the use of the farm, some of the answers of the jury relating to such diminution in certain respects, and others to such diminution in other respects; some of them covering all such diminution in particular respects for the

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entire period, and others covering such diminution in other respects during the particular years separately considered. It is not manifest that the jury in their verdict did not keep within the rule of damages proposed by the appellant for their guidance, that they allowed anything for any species of injury other than those so prescribed, or that they duplicated the rental value in whole or in part in making up the amount of the general verdict. The judgment is affirmed.

Henley, J., absent.

EAST CHICAGO IRON AND STEEL COMPANY v. SIWY.

[No. 2,991. Filed December 21, 1899.]

APPEAL.—*Transcript.*—*Omission of Clerk's Certificate.*—Without the clerk's certificate to what purports to be the transcript, the record cannot be considered on appeal.

From the Lake Superior Court. *Appeal dismissed.*

B. F. Ibach and *J. G. Ibach*, for appellant.

Peter Crumpacker, for appellee.

COMSTOCK, J.—Action brought by appellee against the appellant corporation to recover damages for personal injuries.

It is insisted by the counsel for appellee that the appeal in this cause has never been perfected, for the reason that what purports to be the record has never been certified over the signature of the clerk of the trial court.

Following what purports to be a transcript of the papers and entries in said cause is a certificate thereof, but it is not signed by the clerk. Without such signature, the record can not be considered. §661 Burns 1894, §649 Horner 1897. Appeal dismissed.

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CLARK, RECEIVER, v. SCHROMEYER.

[No. 2,946. Filed December 22, 1899.]

APPEAL AND ERROR.—Assignment of Cross-Errors.—Intervening Errors.—Where the complaint is bad, a judgment in favor of defendant will be affirmed upon an assignment of cross-error on the sufficiency of the complaint, although subsequent errors intervened, if a right conclusion was reached. *pp. 565, 566.*

INSURANCE.—Beneficial Associations.—Collection of Assessments.—An assessment insurance company cannot collect an assessment from one who has accepted a policy and ceased paying thereon, since the contract is unilateral, and the only penalty which follows a refusal to pay is the loss of the policy-holder's rights thereunder. *pp. 566-569.*

From the Clay Circuit Court. *Affirmed.*

J. M. Rawley and T. W. Hutchison, for appellant.

E. S. Holliday, F. A. Horner and S. D. Coffee, for appellee.

HENLEY, J.—This action was by the receiver of the Masonic Benevolent Association of Central Illinois, a foreign corporation, to collect assessments which were alleged to have accrued prior to the dissolution of the association and before the receiver was appointed. The complaint was in two paragraphs. Appellee demurred to each paragraph of complaint. Appellee answered in two paragraphs, the first of which was a general denial. Appellant's demurrer to the second paragraph of answer was overruled. A reply of general denial put the cause at issue. There was a trial by the court resulting in a general finding for appellee. Appellant's motion for a new trial was overruled, and judgment rendered in appellee's favor. Appellant assigns as error the action of the lower court in overruling the demurrer to the second paragraph of answer, and in overruling the motion for a new trial. Appellee has assigned cross-errors separately questioning the action of the lower court in overruling his demurrer to each paragraph of the complaint.

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We will dispose first of the questions arising upon the assignment of cross-errors, because, if the complaint was bad, and appellee's demurrer ought to have been sustained to it, it is not material whether or not subsequent errors intervened; in such a case the judgment of the lower court will be affirmed, because a right conclusion has been reached. *Ice v. Ball*, 102 Ind. 42; *Palmer v. Logansport, etc., Co.*, 108 Ind. 137; *Davis, etc., Co. v. Booth*, 10 Ind. App. 364; *Butler v. Pittsburgh, etc., R. Co.*, 18 Ind. App. 656.

The only questions presented by the demurrer to the complaint are these: Can the receiver of an assessment insurance company collect an assessment from one who has accepted a policy but has ceased paying thereon? Is the contract unilateral, and is the only penalty which follows a refusal to pay, the loss of the policy-holder's rights thereunder? These are new questions in this State. Life insurance contracts have been universally held to be unilateral unless by their express terms made otherwise. The certificates issued by the association for which appellant was the receiver, were beneficiary certificates payable upon the death of the holders. They were in their nature policies of insurance; the company so issuing them was substantially a life insurance company. In 2 May on Ins. §550a, it is said: "There are certain organizations prevalent in this country and elsewhere, under the name of relief, benefit, or benevolent societies, or some similar name, which generally have for their object aid to their members, or their widows and children after the decease of their respective members, and in some cases having both objects. These associations, though not speculative, and not based upon capital paid in as an investment, have nevertheless a general purpose of mutual protection. * * * Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have with great uniformity treated them as substantially life insurance companies, applying to them, and to the relatives

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of the members, the rules and principles applicable to the contract of life insurance." See, also, *Association v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Rockhold v. Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *Commonwealth v. Weherbee*, 105 Mass. 161.

The case of *Lehman v. Clark, Rec.*, 174 Ill. 279, 51 N. E. 222, was in all respects like the case at bar. Appellee, in that case, was the same person as the appellant in the case at bar. Precisely the same questions were before the supreme court of Illinois as are here presented. It was there held that the certificate or policy of insurance, such as was issued to the appellee in this case, was a unilateral contract. The case of *Lehman v. Clark, Rec., supra*, was decided June 23, 1898, which was after the trial and judgment in the case at bar. The supreme court of Illinois in construing this contract of insurance say: "Such contracts have heretofore always been considered unilateral and so the whole plan for withdrawing is embraced in these self-executing clauses of the by-laws and contract. The member's failure to pay is his declaration of severance, and the forfeiture provided for in the by-laws and contract is the association's compensation. The option is with the member, and not with the association. When appellant became a member he was required, among other things, to pay a sum into the mortuary surplus fund. This sum was two maximum assessments on his \$4,000 certificate. This money went directly into the fund for paying death losses,—not a cent of it for dues or expenses. This more than paid his insurance from the date of his admission to the date of the maturity of his assessment for the first death benefit after he became a member. When he had paid the first assessment that paid for his insurance to the maturity of the second and so on. The requirements for admission, not only in this association but in all benefit associations or societies, more than cover the member's insurance from the date of his admission to the maturity of the first assessment after he becomes

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a member. The statute under which the receiver was appointed contemplates that if the court shall find that the association cannot longer continue in operation and properly serve its purpose, then the court shall appoint a receiver, and wind up its affairs, or, if the court shall find that it might longer continue in business, and properly serve its purpose, if its officers would do their duty in making assessments, then the court need not appoint a receiver, and wind up the concern, but may order an additional assessment to be made to meet deficiencies and allow the concern to continue in operation. This shows that the legislature treated these contracts as unilateral. It did not contemplate the making of an assessment after the association had been found unable longer to properly serve its purpose. It is true that, a receiver having been appointed by the court, the court has power, independently of any statute, to order him to collect assets; but that power does not change the character of the contract between the association and the member, and make the member a debtor who by his contract is not so. When such association or society for any reason becomes unable longer properly to carry out its purposes some must lose. All must lose except those that died and were paid before the association became disabled. Those that have died and not been paid should have all there is left and lose the balance. Those that continue to live get nothing and lose all. But it is said those that continue to live had their insurance all the time. They had just that kind of insurance that those that died had, and no better, and paid just as much for it. Those that have died get the surplus fund and whatever else there is, and those that have lived get nothing. The mistakes or mismanagement which caused the ruin, if the fault of the members at all, was as much the fault of the dead as the living, and was equally the misfortune of all."

We think the supreme court of Illinois arrived at the proper conclusion. Appellant correctly contends that the

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contract should be construed and governed by the charter and by-laws of the society and the statute of the domicil of the corporation. This being true, then the case last quoted from is decisive of the question in this case.

Appellant went to trial upon an insufficient complaint. The trial resulted in favor of appellee. There being no cause of action stated against appellee, the judgment of the lower court in his favor was correct, and the intervening errors, if any, will not be considered. Judgment affirmed.

MEYER ET AL. v. RUSTERHOLTZ, EXECUTOR.

[No. 2,978. Filed January 2, 1900.]

WILLS.—Construction.—Introductory Clause.—An expression in the introductory clause of a will of the purpose of the testator to dispose of all real and personal property that he might own at the time of his death, does not in itself dispose of any property, but may be found useful in resolving doubts, if any exist which may be so resolved, in particular dispositive clauses. *p. 571.*

SAME.—Description of Property.—Intention of Testator.—Partial Intestacy.—A testator in the introductory clause of his will expressed his purpose to dispose of all his property, real and personal. In the first clause he gave all his personal property "consisting of household goods" to his stepdaughter and her children. By the second clause all his real estate "including tools" was to be sold and the proceeds given to his nephew and his wife and children. No mention was made in the will of a certain note and money which he owned at the time of his death. *Held*, that the note and money were left undisposed of. *pp. 570-573.*

From the Fayette Circuit Court. *Affirmed.*

G. C. Florea and *L. L. Broaddus*, for appellants.

J. M. McIntosh, for appellee.

BLACK, J.—The appellee, as executor of the will of Kasi-mer Fuchs, deceased, presented to the court below his report in partial settlement of his trust, which was approved. Some months afterward, he presented his report in final settlement. The appellants, Margaret Meyer, Lizzie Meyer and

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Josie Meyer, then appeared and filed their exceptions to both of said reports. The appellee demurred to the exceptions for want of sufficient facts, and the court sustained the demurrer, and the appellants refusing to plead further, the court adjudged that they take nothing on account of their exceptions. Thereupon the court proceeded to the final settlement and the discharge of the appellee.

The appellants have assigned that the court erred in sustaining the demurrer to their exceptions, and also in rendering judgment that they take nothing on account of their exceptions.

The only question discussed before us relates to the construction of the will of the appellee's testator, the court below having adopted the view taken by the executor, to the effect that the appellants were entitled under the will to the testator's household goods, and nothing more, while the appellants contended, and still insist, that they were also entitled to certain money owned by the testator and to the proceeds of a certain promissory note held by him, said money and note being parts of his personal estate.

The will, as set forth in the exceptions filed, is as follows: "Last will of Kasimer Fuchs. I, the undersigned Kasimer Fuchs, a resident of the city of Connersville, county of Fayette, State of Indiana, do hereby declare that after my death all my real estate and personal property shall be disposed of as follows: (1) I bequeath all my personal property consisting of household goods to my stepdaughter Mrs. Margaret Meyer and her children Lizzie and Josie. (2) All my real estate, consisting of house and lot, with adjoining buildings (including my tools), on Grand avenue, No. 124-127, shall be sold by my executor (appointed below) to the most bidding person, and the money received therefrom shall be disposed of as follows: (a) All funeral expenses shall be paid in full from said money (medical services included). (b) The person attending on my sick bed shall receive from said money the sum of \$75, as reward for faith-

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ful accomplished services. Said claim (b) shall be null and void in case of my sudden death from accident or disease. (c) The executor (appointed below) shall pay from said money the expenses caused by sale of said real estate, and shall receive, as a special reward for prompt and faithful execution of my last will, the sum of twenty-five (\$25) from said money. (d) All the remainder of said money shall be forwarded as lawful inheritance to my nephew Kasimer Steidle, his wife and children, living in Burgan, county Schinben and Neisberg, Bavaria, Germany," etc. The remainder of the will contains no matter relating to the disposition of the property or modifying the provisions above set out.

In their exceptions, the appellants showed, amongst other matters, their connection with the testator, and facts which, at least in the absence of other possible facts not stated, might be regarded as tending to prove that the testator would probably be disposed to favor them in his will in preference to his heirs at law residing in a foreign country.

In seeking for the intention of the testator, which so far as it can be found must control, we are to consider the particular clause in connection with all the other parts of the will.

Besides the general requirement that construction of the will should lean away from conclusions involving partial intestacy, there is in the introductory clause an expression of the purpose of the testator through the will to dispose of all the real and personal property that he might own at the time of his death. This expression of the general purpose of the testator does not itself dispose of any property, but may be found useful in resolving doubts, if any exist, which may be so resolved, in particular dispositive clauses. In the absence of terms apparently used in a technical sense, we must interpret the language as being used in its ordinary meaning.

We do not find in the will any particular mention of the money and the note shown by the executor's reports and

stated in the exceptions to be a part of the testator's personal property; and the only particular kinds of personal property mentioned in the will are the household goods disposed of by the first clause, and the tools disposed of by the second clause. These two different species of personal property were given to different groups of persons. It clearly was not the testator's intention to give all the personal property of every kind to the appellants. The will does not disclose an intention of the testator to give anything to Kasimer Steidle and his family, except the residue of the proceeds of the real estate and the tools. Unless, then, it can be said that the first clause gives the residue of the personal property not particularly specified to the appellants, we are driven to hold that as to it the decedent was intestate, and he left it to go as the law sends it in the absence of a bequest.

We can not say that there is any patent ambiguity in the first clause. If there were any provision which upon the face of the will remained so incorrigible that it could not be construed without the aid of extraneous facts, the provision would be void. But there is nothing which would require or permit us to say that the first clause does not dispose of the household goods to the appellants.

There is no latent ambiguity such as occurs where there is in fact more than one subject or object answering the description in the will; but it is claimed, in effect, that, viewed in the light of extraneous facts, the first clause should be regarded as an expression of the intention to give to the appellants the personal property, including the household goods and the money on hand and the proceeds of the note, and that the words "consisting of," etc., should be treated merely as a misdescription of what the testator by this clause gave to the appellants.

The first clause is adapted by its terms to the disposal of the particular species of the testator's personal property which was made up of his household goods, which it appears as a matter of fact he possessed, and to hold that it also dis-

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posed of other entirely different kinds of personal property would be adding materially to the expressed intention, especially where it appears that still another species of personal property is disposed of not to the appellants by a subsequent clause of the will. It is not for the court to make the will in part, however strong the claims of some of the beneficiaries to a larger bounty may seem to be, and although it may be clear that without such action of the court the apparent intention of the testator to dispose of all his property by the will must fail. The law will take care of all that he has left undisposed of in his will.

The case is not parallel with such cases as *Cleveland v. Spilman*, 25 Ind. 95, where a testator being the owner of the south half of the northwest quarter of a certain section of land devised "my land, being the south half of the northeast quarter," etc., or *Martin v. Smith*, 124 Mass. 111, where the testator being seized and possessed of two lots of land, situated one on the north side of a certain street and the other on the south side, devised "all the real estate I may die possessed of to" etc., "which property is situate on the north side of said street." In such cases the error in description is manifestly an error in particularly describing the whole of what is included in the preceding general description; and there is not in such cases, as there is in this, a mere limitation of the general description to a particular species of property, being one of numerous kinds of property to which the preceding general terms are alike applicable.

The judgment is affirmed.

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RAILWAY COMPANY v. KING.

[No. 8,036. Filed January 2, 1900.]

TRIAL.—*Complaint.*—*Theory.*—Where plaintiff, in the trial of an action for damages to property caused by a nuisance, upon objection being made to certain testimony offered, at the request of the court, stated that the theory of her complaint was for permanent damages,

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and defendant withdrew its objections, and the court stated that he would instruct the jury upon the theory so announced, the plaintiff will be held to such theory. *p. 575.*

NUISANCE.—Abatement.—Permanency of Injury.—Measure of Damages.

—Where the acts complained of in an action for damages to plaintiff's property and the comfortable enjoyment thereof consisted of defendant's casting into a large pond near her premises carloads of dirt and offensive material, causing thereby the water to become foul and poisonous, the nuisance was one which could be abated, and plaintiff could not recover for the permanent injury to her property. *pp. 576-586.*

SAME.—Permanency of Injury.—Excessive Damages.—Where in the trial of an action for damages to plaintiff's property caused by a nuisance created and maintained by defendant there was no evidence of specific physical injury to the property except the pollution of the water of a well on the premises, and the rental value of the premises prior to the nuisance was shown to be \$7 a month, and during its continuance, twelve months, the rental value was \$3 a month, and the nuisance was one which could be abated, a judgment for \$900 was excessive. *pp. 576-586.*

From the Ripley Circuit Court. *Reversed.*

J. T. Dye, J. O. Cravens, B. K. Elliott and W. F. Elliott,
for appellant.

J. H. Connelly, F. S. Jones, F. E. Gavin, T. P. Davis
and *J. L. Gavin,* for appellee.

COMSTOCK, J.—Appellee in her complaint alleges that appellant created and maintained a nuisance, to the damage of her property and the comfortable enjoyment thereof. The acts complained of consisted in casting into a large pond adjacent to appellee's premises carloads of dirt and offensive material, causing thereby the water to become foul and poisonous. Appellee's dwelling-house and premises were located some 100 feet from the pond, and, before the acts complained of, was used for the purpose of a residence by herself and two children. The water of the well on the premises was polluted by underground drainage from said pond and rendered unfit for use. That by reason of the placing of the offensive substances in said pond and the stenches arising therefrom, she and her children were made

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sick, and her property was damaged in the sum of \$1,000, and that she suffered irreparable loss in the sum of \$3,000.

A verdict was returned against appellant upon which judgment was rendered in favor of appellee for \$900. With the general verdict answers to interrogatories were returned. Appellant's motions for a new trial and for judgment on the answers to interrogatories were overruled. These rulings of the court are assigned as error.

Among the reasons for a new trial are the following: (1) "The verdict of the jury is not sustained by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) error in the assessment of the amount of the recovery, the same being too large."

The nuisance, as shown by the evidence, was caused by throwing deleterious substances into a pond which had been used for the purpose of supplying water for the engines of appellant. The offensive stench was not observed until the spring of 1896. During the progress of the trial, objections were made to certain testimony offered by the appellee. "After said objection was made by the defendant, the court thereupon requested plaintiff to state the theory of her complaint, whether she was seeking to recover for a permanent injury to property or for a continuous wrong. Plaintiff's attorney thereupon stated to the court and counsel for defendant that the theory of the complaint was for permanent damages to plaintiff's property. The court thereupon announced that it would be so considered and treated, and he would so instruct the jury. Defendant's counsel thereupon stated that they were satisfied if that was the theory of plaintiff's case and would not object to the testimony." To the theory thus announced appellee must be held. *Louisville, etc., R. Co. v. Renicker*, 8 Ind. App. 404; *Cleveland, etc., R. Co. v. Dugan*, 18 Ind. App. 435, and authorities there cited. It follows that the question presented is, does the evidence show a permanent nuisance?

Where the injury is of a permanent character, that is,

one that can not be discontinued, there is a permanent injury. If the evidence fails to show a permanent injury, the theory of the complaint is not supported, and the verdict must be contrary to law. *Louisville, etc., R. Co. v. Renicker, supra; Equitable Ins. Co. v. Stout*, 135 Ind. 444.

The pond in question was not constructed by appellant. The evidence does not show that the pond itself constituted a nuisance. The injury was caused by throwing filth into the water. The question is not here presented whether upon proper complaint appellee could recover damages for injuries during the existence of the nuisance and up to the time of the commencement of the action, but whether she can recover upon proof of temporary injury. A nuisance which may be discontinued is not a permanent one. *Lurssen v. Lloyd*, 76 Md. 360, 25 Atl. 294; *Pond v. Metropolitan, etc., R. Co.*, 112 N. Y. 186, 19 N. E. 487.

In *Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1087, 7 L. R. A. 465, it was said: "The law will not presume the continuance of a wrong."

In §1039 Sutherland on Damages, it is said: "In the first suit for such a nuisance it can not be proved, nor will the law assume that the injury will continue."

In *Steinke v. Bentley*, 6 Ind. App. 663, this court said: "While there may be some difference of opinion upon the proposition, we think the correct rule is that in such a case as this it may reasonably be anticipated that the wrongdoer will remove the cause of injury rather than respond in continued damages." The foregoing authorities warrant two propositions: (1) That the presumption is that a nuisance that can be abated will be abated. (2) That damages as for a permanent injury to property can not be recovered "for an injury which might never occur." A nuisance may be of a permanent character, but one which may be discontinued, and which the law presumes will be, is not of that character.

Where the wrong constituting the nuisance is not permanent, but may be discontinued, the measure of damages

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is not the depreciation in the value of the property. *Baugh v. Texas, etc., R. Co.*, 80 Texas 56, 15 S. W. 587; *Pond v. Metropolitan, etc., R. Co.*, 112 N. Y. 186, 19 N. E. 487; *Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390; *Bare v. Hoffman*, 79 Pa. St. 71; *Johnson v. Porter*, 42 Conn. 234; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210.

The following causes draw the distinction between permanent and temporary nuisances: *Hargreaves v. Kimberley*, 26 W. Va. 787; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674; *Smith v. Railroad*, 23 W. Va. 453. In *Hargreaves v. Kimberly, supra*, evidence was admitted showing a permanent depreciation in value; the court held this was error, saying, "Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him, for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues. The court erred in admitting this evidence, and for this reason the judgment will have to be reversed." It not appearing that the nuisance in the case before us can not be abated (the presumption being that it will be abated), it must be held to be temporary within the meaning of the law. In such case, the measure of damages is the injury to the use of the property, the depreciation in the rental value. *Jackson v. Kiel*, 13 Col. 378, 22 Pac. 504, approved the rule stated by Sutherland on Damages, §414. It is there stated: "The right to recover if established includes the depreciation of rental value, by the difference, in other words, between the rental value free from the effects of the nuisance and subsequent to it."

In *Shively v. Cedar Rapids, etc., R. Co.*, 74 Iowa 169, 37 N. W. 133, the court said: "The alleged nuisance is not necessarily a permanent one, but may be abated at any time by the defendant. Plaintiff would not have been entitled to recover the full value of his property even though he had

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shown that it was valueless while the nuisance existed, because it might prove to be but temporary, hence the depreciation in the rental value, under the facts in this case, was the proper measure of plaintiff's recovery." *Loughran v. City of Des Moines*, 72 Iowa 382, 34 N. W. 172.

The recent case of *City of New Albany v. Lines*, 21 Ind. App. 380, was an action for damages occasioned by reason of a street and sewer improvement. By reason of the construction of the street, and the insufficiency of the sewer pipe to perform its office, the surface water and drainage were thrown back upon the premises of plaintiff, rendering it less desirable as a place of residence; by reason of the accumulation of unwholesome animal and vegetable matter stench and vapors arose therefrom, making appellee sick, and compelling him to move out until he recovered his health; appellees were unable to rent said premises by reason of the conditions aforesaid, and the value of the real estate was greatly reduced. The court, by Black, J., said: "It is not to be presumed that the city will continue indefinitely to maintain such a condition, injurious not merely to property owners immediately adjacent, but also to all residing within reach of the offensive and unwholesome vapors so produced, or that it will not provide reasonable means whereby the water so collected will cease to be thrown back upon the adjacent private property; nor can the plaintiff, by bringing such an action as this, be regarded as accepting such a condition as permanent, and agreeing that it is never to be remedied by the city."

The learned counsel for appellee have cited numerous decisions as upholding the judgment of the trial court, and we briefly refer to them. In *Hyde Park, etc., Co. v. Porter*, 167 Ill. 276, 47 N. E. 206, it was held that when an electric light plant, the operation of which must permanently injure adjacent premises, was constructed and tested by one person and sold by him to another, who operated it, an action for damages might be maintained against either or both, but

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only one recovery could be had. The court stated in the opinion that there was no want of evidence that the steam, smoke, ashes, soot, and cinders were cast upon plaintiff's premises and with the jarring and vibrating resulting from the operation of the plant had materially damaged the plaintiff's property.

In *Denison, etc., R. Co. v. O'Malley*, 18 Texas Civ. App. 200, 45 S. W. 227, appellant constructed a railroad on Travis avenue in Denison, Texas, and in doing so made a cut in said avenue from eight to nine feet in depth along the entire front of appellee's property abutting on said street. Appellee's approach to her property was practically cut off. Appellant had also erected and had in use cattle pens within about 300 feet of appellee's property, and she was annoyed by the noise and disagreeable odors proceeding from these pens. The court held that the evidence showed the stock pens to be permanent in their nature, and the damage resulting from and incident to their operation is of a permanent character. Appellant contended that the damage resulting from the operation of the stock pens, and the use of improper language by persons handling the stock, is not measured by the difference in the value of the property with and without these annoyances, and based upon the supposition that it will continue, but is the damage caused by the temporary annoyance. The court did not approve of this view.

Bassett v. Johnson, 2 N. J. Eq. 154, is cited to sustain the claim that the nuisance in the case at bar is permanent. The bill charged that the defendants were erecting a dam in a creek; that the dam prevented the draining of the meadows of the complainant lying above it and rendered them useless, causing them to be overflowed. The object of the bill was to enjoin the further building of the dam and to abate it as a private nuisance. In commenting upon an instruction given by the chancellor, the court said, that "an injury may be permanent in the sense of the word used in the issue with-

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out continuing for ever. * * * Many cases are put showing a permanent injury though not continuing forever, as the common one of cutting down an orchard, although a new one may be planted, which might in process of time be better than the one cut down." The instruction is not set out in the opinion, but the court said it saw nothing in it to divert the jury from the true question before them.

Rosenthal v. Taylor, etc., R. Co., 79 Texas 325, 15 S. W. 268. Damages caused by the noise, smoke, cinders, and soot of passing trains may be recovered by property owners. The court said: "As to the measure of damages in such cases the authorities are not altogether in accord. Since in most cases a nuisance may be abated by the injured party, and since the wrong-doer may voluntarily remedy the wrong by removing it, the general rule seems to be that ordinarily the party damaged must bring his action for such damages as have accrued up to the institution of the suit and can not recover for any prospective injury. That rule has been adopted in a case very similar to this. *Hopkins v. Railroad Co.*, 50 Cal. 190. But there are other cases which announce a contrary doctrine, and we think with the better reason. *Railroad Co. v. Grabill*, 50 Ill. 241; *Kemper v. Louisville*, 14 Bush 87; *Seeley v. Alden*, 61 Pa. St. 302; *Troy v. Railroad Co.*, 23 N. H. 102; *Finley v. Horshey*, 41 Iowa 389; *Fowler v. New Haven, etc., Co.*, 112 Mass. 338. In the case last cited the court say: 'The case at bar is not to be treated in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. If it results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that the entire damage should be assessed with reference to the past and probable

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future injury.' ” *Baltimore, etc., R. Co. v. Church*, 108 U. S. 317. That is a nuisance which annoys one in the possession of his property and when the annoyance is continuing, courts of equity will restrain the nuisance. The rights of a religious corporation to recover for a nuisance which annoys the members are the same as those of individuals for the same wrong. Damages are not limited to a mere depreciation of the property, but may be given for the inconvenience and discomfort caused to the congregation which tends to destroy the use of the building for church purposes. The nuisance complained of was the use of the engine-house and the operating of the repair-shop of the railroad company.

City of Paris v. Allred, 17 Texas Civ. App. 125, 43 S. W. 62, was an action for damages for a nuisance. The evidence showed the construction and operation of a sewer by defendant whereby its sewage was discharged into a branch running through plaintiff's lands, rendering the water unfit for use, carrying the noxious matter upon his lands, and poisoning the air about his dwelling-house, which nuisance appeared to be permanent in its character. Held sufficient to establish plaintiff's allegations as to permanent damages to his land and to support a verdict for plaintiff on such issue. And where a nuisance created and maintained by the defendant was of a permanent character, plaintiff was entitled to recover in a single action all the damages that have accrued or may accrue in consequence of such injury, the measurement thereof being the depreciation in the value of his lands by reason of such nuisance.

Cases are cited from the supreme court of Iowa. In such it is held that there can be but one recovery. In *Randolf v. Town of Bloomfield*, 77 Iowa 50, the owner of a homestead, in an action to recover for a nuisance affecting his homestead and the health and comfort of his family, is not limited to the damage sustained by reason of the depreciation of the rental value of the property, but is entitled to recover for the inconvenience and discomfort suffered and

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the depreciation of the comfortable enjoyment of the property by himself and family. Sutherland on Damages, §1051, citing this case in the foot-note substantially adopts the language of the court. The following from the same section, we deem pertinent: "A plaintiff suffering from a nuisance by water flooding the ground about his house, destroying his shrubbery and garden and injuring the health of his family, may not only recover for the injury to the house and lot, but he may prove physicians' bills, loss of time of his family on account of sickness caused by stagnant water, not as constituents of the measure of damages, but for the purpose of showing the extent to which the value of the property has been lessened by reason of the acts complained of."

Finley v. Hershey, 41 Iowa 389, was an action to recover damages sustained by plaintiff on account of defendant's wrongfully filling up a slough or arm of the Mississippi river, upon which a slaughter and packing-house owned by the plaintiff was situated. The court announced the law as to the rights of riparian owners. Held that one injured by a pond of water did not have the right to fill up the bed of the water, but might remove the cause rendering the water offensive, or restrain the parties whose acts produced the result and that the measure of damages sustained by riparian owners by the unlawful filling up of a pond is the depreciation thereby occasioned in the value of the property, and both the effect from its present use and upon its permanent value should be considered.

For the reason, as stated by Sedgwick on Damages, §92, that where injury is caused by a trespass on the plaintiff's land, since the defendant cannot remedy the wrong without another trespass, the injury is not continuing, but inflicted once for all and full compensation is recovered by one action. The opinion in the case of *Wells v. New Haven, etc., Co.*, 151 Mass. 46, 23 N. E. 724, holds that the construction of a culvert across a water course is a continuing nuisance;

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that successive actions may be maintained, and that an action is not barred by the six years limitation, the court evidently holding that the injury was temporary.

The case of *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393, is cited by counsel for appellee as illustrating the meaning of the word "permanent." The action grew out of the removal of the railway shops that had been located under a contract. It was held that the word "permanent" in the contract should be construed with reference to the subject-matter of the contract, and that under the authorities of the case, the contract for the permanent location of the shops had been complied with by the establishment of the terminus and the offices and shops of the company contracted for with no intention at the time of removing or abandoning them.

In *Givens v. Van Studdiford*, 4 Mo. App. 498, an action for damages for keeping a bawdy house on premises adjoining the plaintiffs, because of which plaintiff claimed that his house was vacated by his tenants and the property depreciated in value. The court held that the measure of damages was the difference in the selling value of the property and the loss of the rent occasioned by the nuisance. We are of the opinion that this decision can not be reconciled with the general rule. It will not be presumed that a brothel which may be abated will be continued.

We think it may be fairly said from the consideration of the cases referred to, and from many others that might be cited, that where damages have been allowed for prospective injury that the cause, the nuisance, was deemed to be permanent in its nature, although courts have differed as to what was permanent or temporary injury. It is said in *Sutherland on Damages, supra*, §2280: "The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property. * * * The damages for use must not represent the damages for the permanent injury." So damages for the injury to real

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property, amounting to waste or the destruction of portions of it necessary to its convenient use may be recovered in addition to compensation for depreciation in rental value. Sedgwick on Damages, at §91, says: "As stated above, a wrongful act may create a nuisance which will continue and each moment of its continuance will be a new tort. If in such case action is brought, compensation can be had only for loss caused before bringing the action. Thus in an action for flowing land or in polluting a water course, compensation can be had only for loss accruing before the date of the writ." At §95, the same author states the rule as follows: "If the injury is caused by erecting a structure or making a use of land which the defendant has the right to continue, the injury is regarded as committed once for all and action must be brought to recover the entire damages, past and future." The author gives illustrations of nuisances caused by the construction of railroads, the enlargement of water-ways, construction of sewers and culverts; illustrations which might be added to by several cases hereinbefore cited.

Counsel for appellee call attention to the fact that there is evidence that the well on appellee's premises was rendered unfit for use, and that this was a specific physical injury and damage to the property that is lasting and permanent. As already said, there may be a recovery for a specific injury to property. Depreciation in value is only an element of damage where the nuisance is permanent. There may be a recovery for a specific injury to property, a recovery sufficient to reimburse the owner for the expense of repairing the particular injury done, but where the cause of the injury can be abated, there can be no recovery for a depreciation in the value of the property. If the contamination of the well can be considered, as claimed by appellee, a direct physical injury to the property, under the *City of South Bend v. Paxon*, 67 Ind. 228, a case upon which appellee strongly relies, there should be some evidence of the value of the well. In the absence of such evidence the

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amount of the verdict would seem excessive. In the case last mentioned, the court decided that where by reason of the wrongful construction of a culvert across a natural water course water is thrown upon the property of another, and the property physically injured (as was true in that case), there may be a recovery for the actual physical injury and in addition a recovery for the time for which the owner has been actually deprived of the use of the property. But in the case at bar, the question is, can appellee recover for a permanent injury to her property where it is not proved that the nuisance was permanent? Appellee quotes from Sutherland on Damages, §1042, as follows: "If the injury to real estate is in the nature of waste, as where a factory is demolished, trees destroyed, fences broken down, there is no legal obligation or duty resting upon the wrong-doer to abate the wrong or repair the mischief. He is liable only for damages; only one action can be maintained and he is liable in that for the whole damages, prospective as well as retrospective." The case described is not the one before us. Apart from the injury to the well, there is no evidence of physical injury to appellee's premises, and there is certainly no evidence to warrant, on that account, the damages assessed. It must be presumed that the pond could be drained and that appellant would discontinue the depositing of the offensive substances complained of. The witnesses differed in their opinions as to the length of time it would take for the poison to be absorbed, ranging from months to a year or more; all were indefinite. From this testimony counsel for appellee argue that the nuisance is permanent. They insist that the word permanent in this connection does not necessarily mean forever, or that the nuisance should be perpetual. While this is true, the word always conveys the idea of "a continuance in the same state." The nuisance in question does not answer this definition, because it must be presumed that the pond can be drained and that appellant will not continue its perpetration of a wrong. Whether the well be

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regarded as a constituent part of the rental value of the premises and no more, or whether the pollution of its water be deemed a physical injury to the premises, there could not in either event be a recovery except for injury done up to date of the action. The rental value of the premises prior to the nuisance was shown to be \$7 a month; during its continuance, \$2 a month; the time of continuance twelve months; making the depreciation in the rental value \$60. The value of the well is not shown. We conclude that the amount of the judgment is excessive. The conclusion reached renders it unnecessary to consider the other questions discussed.

The judgment is reversed, with instruction to the trial court to sustain appellant's motion for a new trial.

WITTMER LUMBER COMPANY v. RICE ET AL.

[No. 2,904. Filed January 8, 1900.]

PRINCIPAL AND SURETY.—Bonds.—Where a lumber company signed a bond with a contractor to secure the performance of a contract entered into by such contractor not to permit any liens to be filed against the property for material or work done in the construction of the building, the lumber company was not a collateral guarantor, but was bound jointly with the principal as an original promisor. *pp. 587, 588.*

SAME.—Corporations.—Contractor's Bond.—Ultra Vires.—Estoppel.—Where a corporation signed a bond with a contractor to secure the performance of a contract not to permit any liens to be filed against the property for material or work done in the construction of the building in consideration of an agreement entered by such contractor to purchase material from the corporation to be used in the construction of the building, the corporation cannot defeat an answer pleading the bond in bar of an action by it to foreclose a lien on such building for material furnished, on the ground that the contract of suretyship was *ultra vires*. *pp. 588-591.*

From the Marion Superior Court. *Affirmed.*

O. B. Jameson and F. A. Joss, for appellant.

W. J. Beckett, for appellees.

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ROBINSON, J.—Appellant sued Rice, the Interstate Building & Loan Association, and others, to foreclose a mechanic's lien. The building association answered that appellee Rice owned the land upon which appellant seeks to foreclose a lien; that he procured a loan from the building association to build a house, and contracted with one O'Banion to do the work, O'Banion agreeing to give a bond to secure Rice and the association against any mechanic's liens or claims for labor or material furnished; that O'Banion agreed with appellant, a mercantile corporation, that he would purchase the lumber and building material from appellant, in consideration that appellant would become surety on the bond; that appellant became such surety in consideration of such purchase and the profits therefrom to it; that O'Banion purchased of it the material and thereby promoted and advanced its business; that this action is to foreclose a mechanic's lien for the material so purchased; that the bond was executed to promote the interests of appellant; that in the bond appellant and O'Banion agreed with Rice and the association not to encumber the real estate, nor permit others to do so, nor file liens or claims against the same for material or work done, and agreed to hold Rice and the association free and harmless from liens caused by an act or omission of O'Banion or his agents; that O'Banion is totally insolvent; that the association was induced to accept the bond and advance O'Banion the money by reason of appellant executing the bond as surety, a copy of which bond is made an exhibit.

Appellant's counsel have argued only the sufficiency of this paragraph of answer, as it presents the same questions as those presented by the other assignments of error.

The answer is pleaded only in bar of appellant's action. It pleads an estoppel, does not ask any affirmative relief, and can not be considered a counterclaim.

Appellant executed the bond as surety, so designated in the body of the bond and in the signature to it. Appellant's

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contract was not collateral to that of the principal, but it bound itself jointly with the principal as an original promisor. The liability of the obligors accrued at the same time and arose out of one breach of the same instrument. "In a strict collateral guaranty, the guarantor does not undertake to do what the principal is bound to do, but he undertakes, in the event the principal fails to do what he has promised, to pay damages for such failure. A guarantor undertakes to pay such damages as result from the principal's default. A surety undertakes to do the particular thing if the principal fails." *Wheeler v. Rohrer*, 21 Ind. App. 477; *Bryant v. Stout*, 16 Ind. App. 380; *Newcomb, etc., Co. v. Emerson*, 17 Ind. App. 482; *Lane v. Mayer*, 15 Ind. App. 382; *Conduitt v. Ryan*, 3 Ind. App. 1; *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686.

It is argued that the act of the corporation in signing the bond was *ultra vires*. But it is claimed by counsel for appellees that even if the act was *ultra vires*, the corporation, by receiving the consideration, is now estopped to deny its power to execute the bond. In executing the bond appellant did not violate any statute prohibiting the act. All that can be claimed is, there was a want of power to do the act.

In the absence of express statutory authority, or authority clearly implied from a grant of power by the State, a corporation can not become surety or guarantor for another person for the mere accommodation of the latter. 7 *Thompson Corp.* §8346; 2 *Cook Corp.* §774. And in this State appellant is not authorized to become such surety or guarantor. But there are exceptions to this general rule, and circumstances may exist in which a corporation may rightfully exercise this power in furtherance of its own corporate purposes.

It is shown that appellant became surety on the bond in consideration of the profits it would derive from the purchase of the building material from it; that the materials were so bought, and that they are the same materials for

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which appellant now sues; and that the building association accepted the bond and advanced the money by reason of appellant's executing the bond as surety.

The consideration thus moving to appellant was a valuable consideration and was in furtherance of its own corporate purposes. It is also shown that the contract, as between appellant and the building association, was executed. It has received the benefits accruing to it through the acceptance of the bond by the association and the making of the loan by the association, which loan it was induced to make because of the bond. The contract has been fully performed by the building association. It loaned its money upon the strength of appellant's action in executing the bond, and appellant was enabled to and did receive a benefit by reason of such action. It has received the consideration it agreed to accept. There were mutual agreements and mutual advantages. There is no rule of law that will permit appellant, under such circumstances, to say now that it had no power to make the contract.

In *Wheeler, etc., Co. v. Everett Land Co.*, 14 Wash. 630, 4 Am. & Eng. Corp. Cases (N. S.), 185, 45 Pac. 316, appellant corporation, a lumber company, became surety on a contractor's bond conditioned that he would erect a building in a specified manner and furnish all materials. The lumber company sued to foreclose a lien for materials sold by it to the contractor. There was an answer and counterclaim pleading the bond and claiming the lumber company was liable for certain materials used which the contractor had failed to furnish. The bond was held valid and a judgment in damages was given against the lumber company. In the opinion the court said: "And as appellant in consequence of going upon the bond obtained direct and substantial benefits by reason of the sale of a large amount of material and as the bond was accepted and relied upon in good faith by the respondent, appellant should not be allowed to invoke the doctrine of *ultra vires* and so escape liability. In con-

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struing the powers of corporations the tendency is toward a more liberal interpretation than formerly, and in holding that appellant had authority to execute this bond we are but following several prior decisions of this court." See, also, *Winterfield v. Brewing Co.*, 96 Wis. 239, 71 N. W. 101; *Holmes v. Willard*, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170.

Lucas v. Transfer Co., 70 Iowa, 541, 30 N. W. 771, cited by counsel, was a contract of suretyship for mere accommodation. Likewise, in *Humboldt Min. Co. v. American, etc., Co.*, 62 Fed. 356, cited by counsel, it appears that no consideration was paid to the guarantor corporation. That case states the general rule, that ordinarily it is not within the power of a trading corporation to guarantee the obligations of another, but recognizes the exception that there may be circumstances under which it may be done. *Marbury v. Land Co.*, 62 Fed. 335.

While the case at bar is not altogether like the case of *State Board v. Citizens St. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702, and *Wright v. Hughes*, 119 Ind. 324, yet the principle upon which those cases rest should control in this case.

In *State Board v. Citizens St. R. Co.*, *supra*, the railway company, for the purpose of increasing its own profits, subscribed \$1,000 as an inducement to the board to locate its grounds at a particular place, which it did. In a suit to collect the subscription the court said: "The street railway company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our opinion, the street railway company is not at liberty to assume this position. It has received the profits resulting from the compliance of the plaintiff with the contract. * * * It would be unjust for the company now to escape performance of the contract by which these profits have been realized."

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In *Wright v. Hughes, supra*, it is said: "The rule is now too thoroughly established to be longer open to question, that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation." Citing, *State Board, etc., v. Citizens St. R. Co., supra; Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. 674; *Chicago, etc., R. Co. v. Derkes*, 103 Ind. 520; *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172; *Hitchcock v. Galveston*, 96 U. S. 341; *Railway Co. v. McCarthy*, 96 U. S. 258; *Bradley v. Ballard*, 55 Ill. 413; *Memphis, etc., R. Co. v. Dow*, 19 Fed. 388; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. See, also, *Voris v. Star City Building, etc., Assn.*, 20 Ind. App. 630; *2 Beach Priv. Corp.* 701; *5 Thomp. Corp.*, §6025; *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492, 60 Am. St. 172. Judgment affirmed.

WOLFE, BY NEXT FRIEND, v. PEIRCE, RECEIVER.

[No. 3,145. Filed January 4, 1900.]

RECEIVERS.—Resignation Pending Suit.—Change of Parties.—Appeal.—Railroads.—Where the receiver of a railroad company resigned pending a suit against him as such receiver, and the defense was taken up by his successor, judgment was properly rendered in the name of the original receiver, and an appeal might be taken by plaintiff from such judgment without change of parties in the assignment of errors. pp. 592-597.

APPEAL. — Notice. — Process.—Railroads.—Receivers.—Corporations.—Notice of a vacation appeal from a judgment in an action against the receiver of a railroad company, appointed by the United States Court, served upon a freight and ticket agent of defendant, within the State, constituted a sufficient service on the receiver, who resided outside the State. pp. 598-600.

From the Howard Superior Court. *Motion to dismiss appeal overruled.*

J. E. Moore and *Freeman Cooper*, for appellant.

C. G. Guenther, *Braden Clark*, *C. Brown* and *C. A. Schmettau*, for appellee.

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BLACK, J.—The appellant sued the appellee, receiver of the Toledo, St. Louis and Kansas City Railroad, by appointment, as alleged in the complaint, of the circuit court of the United States for the district of Indiana. There was final judgment in favor of the defendant, from which the plaintiff appeals.

The appellee and Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad, enter special appearance, and move to set aside the submission, and to set aside the service of notice of appeal, and to dismiss the appeal, upon the following grounds: “(1) That said suit and judgment appealed from are against Robert B. F. Peirce, and that, prior to the filing of said appeal in this court, the said Robert B. F. Peirce, the appellee, died. (2) That said Samuel Hunt has not been substituted, either prior to or since this appeal, as a party to this suit. (3) That the notice of appeal herein commands the sheriff to notify Robert B. F. Peirce, receiver for the Toledo, St. Louis and Kansas City Railroad, and the sheriff in his return attached thereto states that he has not served the said Robert B. F. Peirce. (4) That the return of the sheriff attached to the notice of appeal herein affirmatively shows that no notice of said appeal has been served upon the appellee, Robert B. F. Peirce. (5) That there is not now, nor was there at the time the assignment of errors was filed in this court, any such person living as Robert B. F. Peirce, receiver for the Toledo, St. Louis and Kansas City Railroad, who is named as appellee in the assignment of errors herein, as shown by the proof on file. (6) That the assignment of errors is defective, in this, to wit: That Robert B. F. Peirce, receiver, etc., is named as appellee in the assignment of errors, whereas said Robert B. F. Peirce was dead before the transcript and assignment of errors were filed in this court, as shown by the proof on file. And the appellee and said Hunt file herewith in support of said motion the affidavit of Braden Clark, which affidavit is marked Exhibit A and made part hereof.”

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The affidavit to which reference is thus made is to the effect that at the time of the filing of the assignment of errors, May 17, 1899, said Robert B. F. Peirce was dead. To this motion the appellant has responded by filing in this court a verified answer, which with its exhibits shows, in substance, that on the 16th of November, 1898, Robert B. F. Peirce, then the receiver of said railroad, filed his resignation as such receiver in the office of the clerk of the United States Circuit Court of the western division of the northern district of the state of Ohio, at the city of Toledo, Ohio, being the office of the clerk of the court entertaining and having jurisdiction of said Peirce as such receiver; that on the 23rd of November, 1898, said court accepted said resignation, to take effect December 1, 1898, and said court on said 23rd of November, 1898, appointed as the successor of said Peirce in said receivership Samuel Hunt, a citizen of the state of Ohio, and conferred upon him from and after December 1, 1898, all the powers theretofore exercised by said Peirce, and imposed upon said successor all the obligations and duties theretofore imposed on said Peirce, etc.; that on December 1, 1898, said Hunt duly qualified and entered upon his duties as receiver under said appointment and took full and complete control of all the property of said railroad, and has since that time continued to act and is now acting as such receiver; that said resignation, or a copy thereof, together with the said appointment of said Hunt, was also filed and recorded in the United States Court at Indianapolis, Indiana, on the 25th of November, 1898; that said Peirce was living on the 1st of December, 1898; and thereafter he did not have official connection with said railroad as receiver or otherwise, and that he did not die till the 5th of December, 1898; that while said Peirce was still acting as such receiver, on the 18th of November, 1898, the appellant filed his amended complaint in the Howard Superior Court, being the complaint set out in the record; that afterward, said Samuel Hunt, the successor of said

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Peirce, on the 25th of April, 1899, by his attorneys, one of whom verified said motion to dismiss herein, appeared in said superior court to said amended complaint and filed a demurrer thereto, which is set out in the record; that upon the filing of the record in this cause in this court, the clerk thereof under his hand and seal issued a notice to appellee in the usual form, which notice was served by L. W. Harness, sheriff of Howard county, Indiana, upon said Samuel Hunt, the successor of said Peirce as such receiver, by reading to and within the hearing of William J. Carroll, the freight and ticket agent of the appellee at the city of Kokomo, Howard county, Indiana; also by leaving a true copy with said Carroll. A copy of the notice with the sheriff's return is set forth, and shows, as does the original notice with the return on file in the office of the clerk of this court, that the sheriff, on the 20th of May, 1899, "served the within Samuel Hunt, successor of Robert B. F. Peirce as receiver for the Toledo, St. Louis and Kansas City Railroad, by reading to and within the hearing of William J. Carroll, the freight and ticket agent of the appellee at the city of Kokomo, Howard county, Indiana; also left a true copy with said Carroll, no president or other high official of said appellee being in my bailiwick, and said Carroll being the agent of said company and authorized to transact business for said corporation." It is further stated in the appellant's said answer to said motion herein that the interest which said Peirce had as such receiver passed to his successor by the resignation of said Peirce and the action of the court in appointing said Hunt as his successor, and that no interest passed to said successor, Hunt, by the death of said Peirce; that Hunt, the present receiver, being a non-resident of the State of Indiana, the notice served upon said agent at Kokomo by said sheriff, as shown by his return, was the only practicable way in which personal service could be had upon the appellee.

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We have a statute, to which reference has been made in argument, by which it is provided, that "in case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment." §648 Burns 1894, §636 Horner 1897.

It is true that the action was brought against Peirce, receiver, etc., and the judgment was rendered in favor of the defendant by that name, and said Peirce died before the appeal to this court was commenced, the appellee being named in the assignment of errors as was the defendant below. It appears, however, that Mr. Peirce died, not since, but before the rendition of the judgment in the court below.

Another section of our code, relating to proceedings in the trial court, §272 Burns 1894, §271 Horner 1897, provides, that "no action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

The action was not one against Mr. Peirce as an individual, but was one against him in his capacity of receiver of the corporation; and there could not have been any recovery against him personally; and whatever interest he had in the action, it was not ended by his death, but it had wholly terminated before his death by his resignation, and the appointment and qualification of his successor in the receivership, in whom thereafter continued the interest

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which once was in Mr. Peirce. It was not necessary to change the names of the parties to the action pending in the court below, but it was proper for the case to proceed as it did, the defense being taken up by the receiver who succeeded Mr. Peirce.

When a change of interest has occurred before judgment, and it is proper to render the judgment without a change of name of an original party, the appeal from such judgment may be taken and prosecuted without such a change in the naming of the parties in the assignment of errors.

In *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180, the action had been commenced in the name of the appellee as plaintiff against the appellant as defendant. After the commencement of the action a receiver for the appellee was appointed, and the receiver sold and assigned the claim sued on to one Isaac D. Fletcher, who owned it at the time of the trial; yet there was no change in the names of the parties either in the trial court or in this court, wherein the judgment was reversed.

Though in the case before us, the receiver being one appointed by the circuit court of the United States, leave of court to sue the receiver was not necessary, and there might have been a substitution of the name of the new receiver, yet it was not necessary to make such change in the name of the defendant in the court below, or, as we think, at any subsequent stage of the case.

In commenting upon the statute (24 U. S. Stat. at Large, 554, 25 U. S. Stat. at Large 431), providing (§3) that every receiver or manager of any property appointed by any court of the United States may be sued in respect of "any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed," etc., it is said in *Thompson on Corp.* §7133: "It was not intended, by the use of the word 'his,' to limit the right to sue without leave of the court to cases where the cause of action

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arises from the conduct of the receiver himself or his agents. On the contrary, with respect to his liability, the receiver stands substantially in the place of the corporation; and he is therefore suable, under the statute, without leave of the court, upon a cause of action arising from the theoretical tort of his predecessor in the office."

In *McNulta v. Lochridge*, 141 U. S. 327, it is said: "If actions were brought against the receivership generally or against the corporation by name, 'in the hands of', or 'in the possession of,' a receiver without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

It is not necessary for us to decide whether or not there would be necessity for a change in the name of the defendant below if the original receiver, Mr. Peirce, had died before judgment and while still holding the receivership, or whether or not it would have been necessary to name the appellee differently in the assignment of errors if Mr. Peirce, still in the receivership, had died after the rendition of the judgment below.

Upon the state of facts shown under the motion now being considered, there was no impropriety in the naming of the appellee in the assignment of errors. Indeed, construing the statement of reasons in the motion with proper strictness, it could not be held, even without any counter showing, that there is any defect in the assignment of errors.

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It is required by rule thirty-five of this court, that where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual for any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal.

The statute provides that the notice of a vacation appeal to be issued by the clerk of this court shall be "to the appellee." §640 R. S. 1881, §652 Burns 1894. *Dougherty v. Brown*, 21 Ind. App. 115.

It is proper for us to consider whether or not the service of notice of this vacation appeal shown by the sheriff's return is sufficient. The receiver, Mr. Hunt, is shown to be a resident of the state of Ohio, and if notice can not be served upon him as receiver by serving his agent, as was done in this case, but only constructive notice can be given to the receiver, it would result that without the obtaining of personal service upon him individually in this State no personal judgment against him as receiver could be obtained in this State, wherein through his agents he is operating a railroad, in an action, such as the one at bar, wherein the alleged cause of action is a personal injury to the plaintiff suffered through alleged fault of a servant of the receiver while assisting in the operation of a train upon said railroad. Our statute, §318 Burns 1894, §316 Horner 1897, provides, that "the process against either a domestic or foreign corporation may be served on the president, presiding officer, chairman of the board of trustees, or other chief officer (or if its chief officer is not found in the county, then upon its cashier, treasurer, director, secretary, clerk, general or special agent). * * * If none of the aforesaid officers can be found, then upon any person authorized to transact business in the name of such corporation," etc.

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The service made by the sheriff of the notice of appeal was such as would be good service of a summons in an action against a corporation, or would be good service of notice of an appeal if the appellee were a corporation. The act of Congress referred to above provides (§2) that whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, "in the same manner the owner or possessor thereof would be bound to do if in possession thereof."

In *Central Trust Co. v. St. Louis, etc., R. Co.*, 40 Fed. 426, it was held that in an action in a state court against a receiver of a railroad company appointed by a court of the United States, who resided outside the state, where by the statutes of the state service on the clerk or agent of any station of a railroad company was good service on the company, service on a station agent ought to be good service on the receiver, and that under said act of Congress and the statutes of that state it probably was good service on the receiver; and, to remove all doubt, an order to that effect was made by the court of the United States.

In *Eddy v. Lafayette*, 49 Fed. 807, the court expressed the opinion that said act of Congress was intended to place receivers on the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of obtaining service.

In *Proctor v. Missouri, etc., R. Co.*, 42 Mo. App. 124, it was held that under said statute of the United States, where service was had in such a way that it would have been good against the corporation before the business and property thereof were placed in the hands of the receiver appointed by a court of the United States, it was sufficient service on the receiver; and therefore service on a station

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agent was good as against the receiver; and that though the sheriff may have understood that he was commanded to serve the corporation and that he had made service on the corporation, such understanding of the sheriff was immaterial, since, in fact, he served the agent of the receiver. See Cook on Corp., §871, and notes; Thompson on Rec., §§3132, 8045; Beach on Rec., §386; Smith on Rec., §286, and notes.

The merits of the cause are not now before us for decision. The motion to set aside the submission and the service of notice of appeal and to dismiss the appeal is overruled.

MURRAY ET AL. v. CAZIER.

[No. 2,798. Filed April 20, 1899. Rehearing denied Jan. 5, 1900.]

HUSBAND AND WIFE.—Lease.—Presumption.—Where a wife joins with her husband in a lease, it will be presumed, in the absence of a special agreement to the contrary, that the inducement for the release of her inchoate interest, as to the grantee, was the consideration paid to her husband. *p. 601.*

LANDLORD AND TENANT.—Rents.—Descent.—Rents coming due after the landlord's death go to the heir as an incident of the reversion. *p. 602.*

SAME.—Lease.—Rents Accruing After Lessor's Death.—A provision in a lease by a husband, that rents accruing after his death shall be paid to his widow, is invalid, as an attempted testamentary devise. *p. 603.*

SAME.—Lease.—Rights of Widow as to Rents Accruing After Husband's Death.—A widow, as the survivor of her husband, cannot maintain an action on a lease for rents accruing after her husband's death, although she may have joined with her husband in the execution of the lease. *p. 604. Black, J., dissenting.*

From the Noble Circuit Court. *Reversed.*

M. H. Cazier and L. W. Welker for appellants.

H. G. Zimmerman and R. P. Barr, for appellee.

ROBINSON, J.—Appellee's complaint shows these facts: In 1894 Murray Cazier was the owner and in possession of certain described real estate; that he and his wife, appellee,

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executed a written lease whereby they leased "his farm of 160 acres of land" as described, for three years from April 1, 1895, to one Resler. The lease was signed by all three of the parties, and provided that certain rent should be paid by Resler to "the parties of the first part," and that in the event of Murray Cazier's death during continuance of lease the rent should be paid to appellee, who was to use it in paying taxes on the land, repairing fences, in support of herself and family, and the balance if any in payment of debts if any against Murray Cazier; that Murray Cazier died in 1897 leaving appellee surviving him. She brings this suit for rent accruing after his death.

Appellants, who are the heirs of Murray Cazier, were substituted as defendants upon application, under the statute, by Resler who paid into court the rent due and was discharged from liability.

A wife has no interest in her husband's lands which she can convey by separate deed; but she does have an interest which she can release by joining with her husband, and such release may be a valuable consideration. If she joins her husband in a deed, in the absence of any special agreement, it will be presumed that the inducement for her release, as to the grantee, was the consideration paid to her husband, and not that she was separately paid or promised anything by the grantee. See *Jarboe v. Severin*, 85 Ind. 496; *Worley v. Sipe*, 111 Ind. 238; *Worth v. Patton*, 5 Ind. App. 272.

In the case at bar appellee had only an inchoate interest in the land leased at the time of the lease. Although an interest, it is not a present estate. It constitutes no diminution of the husband's present estate. He had the right to convey the fee without her, subject only to the purchaser's being divested of one-third on certain contingencies. Her joining in the conveyance simply barred the contingencies which would give her a vested estate. The owner of the land, the husband, had entire control over the rents during his lifetime and could direct their payment to whomsoever he

pleased. The fact that the rents were to be paid to the husband and wife could neither enlarge nor diminish her rights or interest in the land. Her joining in the lease affected only what would become her's under the statute or by will at his death. See *McCormick v. Hunter*, 50 Ind. 186; *Strong v. Bragg*, 7 Blackf. 62; *May v. Fletcher*, 40 Ind. 575; *Thompson v. McCorkle*, 136 Ind. 484; *Bever v. North*, 107 Ind. 544; *Hudson v. Evans*, 81 Ind. 596.

Had there been a note or other obligation, independent of the lease, given to secure the payment of rent, and made payable to the husband and wife, the doctrine of *Abshire v. State*, 53 Ind. 64, might apply.

But the unaccrued rents were neither real estate nor personal chattels in possession. Appellee's right to what she now claims did not become vested during her husband's life. The rents had not yet accrued. They did not become a debt due until after the husband's death. Nor can such rents be described as accounts. *Watson v. Penn*, 108 Ind. 21.

A rent is defined as "a right to a certain profit issuing annually, or rather periodically, out of lands and tenements corporeal in retribution (reditus) for the land that passes." 2 Minor's Insts., 32; Gilbert Rents, 9; 1 Th. Co. Lit. 442; Taylor Landlord & Tenant, §369.

The rent is not a part of the thing demised, but simply a profit issuing out of it. This profit goes to the owner of the land. It must be originally reserved to the lessor, because it is a return for his land. As the rent accrued he could do as he pleased with it, for it then became as any other debt due. It is quite true that rent may be assigned by a lessor before it becomes due, so as to divest the lessor of all right of action for such rent. But rents coming due after the landlord's death go to the heir as an incident of the reversion. If the landlord was seized in fee, the reversion passes to the heir or devisee, and so the rent would go to the heir or devisee. Rents like those at bar are in the nature of chattels real, and until they have become due they

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are annexed to the real estate, and are an incident of the reversion. See *King v. Anderson*, 20 Ind. 385; *Evans v. Hardy*, 76 Ind. 527; *Hankins v. Kimball*, 57 Ind. 42; *Watson v. Penn*, 108 Ind. 21; 2 Minor's Insts., 47; Gilbert Rents 66; Bacon Abr. Rent, H.

It has been held that a written instrument executed by a decedent in his lifetime acknowledging an indebtedness for money received, and containing a promise to pay after his death was a contract in the nature of a promissory note, and not an attempted testamentary disposition of property, and such is the holding in *Wolf v. Wilsey*, 2 Ind. App. 549, cited by appellee's counsel. But we fail to see how the case at bar can be controlled by the holding in that case. See, also, *Caviness v. Rushton*, 101 Ind. 500; *Price v. Jones*, 105 Ind. 543.

Keeping in view the nature of the estate held, and the characteristics of a rent, we think it follows that a disposition of rents that are to fall due after the landlord's death must necessarily be testamentary in its character, and must be made with the required statutory formalities. See *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324; *Doe, etc., v. Lanius*, 3 Ind. 441, 56 Am. Dec. 518.

That part of the lease directing the rents after the husband's death to be paid to appellee was simply an attempt on his part to dispose of that much of his estate after his death. It vested no present interest, but was an attempted disposition to take effect after death. It discloses the intention of the husband respecting the posthumous destination of that part of his property. See *Moore v. Stephens*, 97 Ind. 271; *McCarty v. Waterman*, 84 Ind. 550; *Stroup v. Stroup*, 140 Ind. 179; 19 Central Law Journal 46. See also *Turner v. Scott*, 51 Pa. St. 126; *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Wren v. Coffey*, (Texas Civ. App.), 26 S. W. 142. The demurrer to the complaint should have been sustained. Judgment reversed.

Henley, J., absent.

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ON PETITION FOR REHEARING.

ROBINSON, J.—In the original opinion the complaint was held bad. It is now argued that the complaint shows at least that appellee was entitled to one-third of the rents as widow of Murray Cazier. But the complaint does not show that appellee took any of the real estate described in the lease upon her husband's death. It is not stated whether Murray Cazier died testate or intestate. It does not necessarily follow that because appellee survived as widow she took any part or all of this particular real estate. She may have taken it all or she may have gotten none of it. She does not show that upon his death she became the owner of all or of any part of the land leased. Besides she does not sue as an heir or as a devisee of Murray Cazier; but she sues as the survivor named in the lease, and seeks to enforce only such rights as she claims are hers under the lease. She sues upon the lease. She seeks to enforce the terms of the lease. Her action is based upon that theory and none other. What rights she may have to rents as owner of the land or any part of it after her husband's death is not presented by the complaint. The original opinion simply holds that she can not maintain an action on the lease as the survivor of her husband. The answer pleaded was good against a demurrer, and the demurrer to the answer should have been overruled. But as the complaint, upon the only theory it can have, did not state a cause of action against either the tenant or those interpleaded, the demurrer to it should have been sustained.

Petition overruled.

Black, J., dissents.

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CHICAGO AND SOUTHEASTERN RAILWAY COMPANY
v. SPENCER.

[No. 2,963. Filed January 5, 1900.]

COURTS.—*Jurisdiction of Circuit Court in Actions in Tort.*—Under §1366, as construed with §1500 Burns 1894, the circuit court has concurrent jurisdiction with justices of the peace in actions in tort, where the amount claimed is less than \$100. pp. 606, 607.

PLEADING.—*Complaint.*—*Railroad.*—*Stock Killed.*—An allegation in a complaint that defendant, a railroad company, owned, used and operated a certain railroad with tracks, etc., in the county of Boone, and that plaintiff was the owner of a certain hog which, "at said time and place," strayed on the track of said railroad and was killed, sufficiently shows that the hog was killed in Boone county. p. 609,

SAME.—*Complaint in Two Paragraphs.*—*Jurisdiction.*—Where a complaint in two paragraphs alleges two causes of action, the fact that the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other. pp. 609, 610.

SAME.—*Complaint.*—*Railroad.*—*Stock Killed.*—A demurrer to a complaint in the circuit court against a railroad company for \$8 damages for the killing of a hog, on the ground that "the court had no jurisdiction over the subject-matter of the action alleged in the complaint," is sufficient to raise the question of the jurisdiction of the court. pp. 609-611.

SAME.—*Joint Demurrer.*—A demurrer to a complaint in two paragraphs, upon the ground that "the court had no jurisdiction over the cause of action alleged in either paragraph of said complaint," is not objectionable as a joint demurrer. pp. 606, 611.

From the Boone Circuit Court. *Reversed.*

W. R. Crawford and U. C. Stover, for appellant.

S. M. Ralston, for appellee.

COMSTOCK, J.—The complaint in this action is in two paragraphs. The first is based upon an alleged negligence of appellant in permitting the emission of sparks of fire from its locomotive and into a certain meadow of the appellee, from which negligence a fire is alleged to have resulted by which the meadow and a fence were destroyed. The value

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of the meadow is alleged to be \$35, and of the fence \$40. Judgment is demanded for \$75. The second paragraph is founded upon the statutory liability for the negligent killing of stock by railroad companies, and charges the killing by appellant's cars and locomotive of a certain hog of the value of \$8, for which amount judgment is prayed. Upon both paragraphs, appellee asked judgment for \$85. A demurrer to each paragraph was filed upon the ground, (1) that neither paragraph states facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction over the subject of the action alleged in either paragraph. The demurrer was overruled, and appellant answered in general denial. A trial by the court resulted in a judgment in favor of appellee for \$83.

The errors assigned are: (1) The court had no jurisdiction over the subject-matter of the action in the second paragraph of the complaint; (2) the court had no jurisdiction over the person of the defendant in the second paragraph of the complaint; (3) the court erred in overruling the demurrer to the complaint; (4) the court erred in overruling the demurrer to the second paragraph of the complaint.

Counsel for appellant argue that the demurrer should have been sustained to the first paragraph of the complaint on the ground that the court had no jurisdiction over the subject-matter set out in that paragraph. They argue that, as the amount sued for is less than \$100, the circuit court had no jurisdiction. In support of this position, §§1366 and 1500 Burns 1894, are cited. Section §1366, *supra*, provides: "Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace." * * * Section 1500, *supra*, provides: "Justices of the peace shall have jurisdiction to try and determine suits founded on contracts or tort, where the debt or damage claimed or the value of the property sought

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to be recovered does not exceed one hundred dollars, and concurrent jurisdiction to the amount of two hundred dollars, but the defendant may confess judgment for any sum not exceeding three hundred dollars. No justice shall have jurisdiction in any action of slander, for malicious prosecutions, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party."

It is claimed that §1500, *supra*, gives to justices of the peace exclusive original jurisdiction in cases arising on contract or tort where the amount involved is \$100 or less, and jurisdiction concurrent with the circuit court to the amount of \$200, and \$300 when the defendant will confess a judgment not exceeding that amount; that the exception made in §1366, *supra*, "except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace" contemplates that justices of the peace shall have exclusive original jurisdiction in certain cases. Counsel admit that §1500, *supra*, considered alone, may seem ambiguous, but when read in connection with §1366 its meaning becomes obvious.

Upon the interpretation of §1500, the Supreme Court, in *Leathers v. Hogan*, 17 Ind. 242, said: "The section of the statute above quoted, then, means the same as though it read thus, on the point of jurisdiction: Justices of the peace shall have original jurisdiction in actions of contract and tort, to the amount of one hundred dollars. Justices of the peace shall have original jurisdiction in such actions to the amount of two hundred dollars. Justices of the peace shall have jurisdiction to enter judgments by confession to the amount of three hundred dollars. The first clause in the section, giving jurisdiction to the extent of one hundred dollars, is surplusage, because the greater jurisdiction conferred by the second clause includes the less; but surplusage, though it may produce obscurity and confusion, does not, of itself, absolutely vitiate. It may, it is true, in

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some cases, produce so great a degree of uncertainty as to render an act void for that cause. This is not such a case."

In *Harrell v. Hammond's Adm.*, 25 Ind. 104, the court in construing the same section, said: "The act of March 11, 1861, governing this case, provides that 'justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, when the debt or damage claimed, or the value of the property sought to be recovered, does not exceed \$100, and concurrent jurisdiction to the amount of \$200, but the defendant may confess judgment for any sum not exceeding \$300.' This is by no means a statute free from ambiguity. It does not give the justice exclusive jurisdiction in any sum, and yet it confers concurrent jurisdiction in any amount greater than that conferred in the provision for the general jurisdiction. *Leathers v. Hogan*, 17 Ind. 242, was a suit commenced before a justice, after this act went into force, the damages claimed being \$200. On appeal to the common pleas, the cause was dismissed for want of jurisdiction. It was held that the dismissal was error, and that the justice had jurisdiction of the cause. We shall not disturb that ruling."

In *Grubaugh v. Jones, Adm.*, 78 Ind. 350, the foregoing cases are cited and followed. The expressions of the court in *Leathers v. Hogan, supra*, and which is followed in the two later cases cited, are pronounced by counsel for appellant as "*dicta*." This court is not justified in adopting that view. We must hold that the court committed no error in overruling the demurrer to the first paragraph of the complaint.

Counsel for appellant contend that the demurrer to the second paragraph of complaint should have been sustained because it did not state a case over which the Boone Circuit Court could exercise jurisdiction. The action against railway companies for stock killing is, as counsel state, purely statutory, and can only be brought in the county in which the stock is killed or injured, §5313 Burns 1894, and the

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place of the killing must be averred in the complaint. Where this allegation is wanting, a demurrer for want of jurisdiction must be sustained. *Whitewater R. Co., v. Bridgett*, 94 Ind. 216; *Croy v. Louisville, etc., R. Co.*, 97 Ind. 126; *Lake Erie, etc., R. Co. v. Fishback*, 5 Ind. App. 403.

The paragraph in question avers: "That on the — of July, 1895, this defendant, a corporation duly organized under the laws of the State of Indiana, owned and operated a certain railroad known as the Chicago & South-eastern Railway Company, with tracks, locomotives, and cars in the county of Boone and State of Indiana. That at said date the plaintiff was the owner of a certain hog of the value of \$8, which hog at said time and place strayed on the track of said railroad company at a place where the defendant had failed and neglected to maintain sufficient fence." Without considering it as a model of clear pleading, we are of the opinion that it sufficiently shows that the hog was killed in Boone county. *Lake Erie, etc., R. Co. v. Rinker*, 16 Ind. App. 334.

It is also argued that the demurrer to the second paragraph should have been sustained for want of jurisdiction, "because the subject-matter of this paragraph was without the jurisdiction of a circuit court." The statute upon which this paragraph is based (§5313 Burns 1894) can only be enforced, when the value of the stock killed or injured does not exceed \$50, before a justice of the peace. *Indianapolis, etc., R. Co. v. Kercheval*, 24 Ind. 139; *Indianapolis, etc., R. Co. v. Elliott*, 20 Ind. 430; *Toledo, etc., R. Co. v. Tilton*, 27 Ind. 71; *Jeffersonville, etc., R. Co. v. Brevoort*, 30 Ind. 324; *Louisville, etc., R. Co. v. Quade*, 101 Ind. 364. A circuit court can only be resorted to where the value of the stock injured or killed exceeds \$50; nor can injuries inflicted at different times be proved to give a circuit court jurisdiction. *Toledo, etc., R. Co. v. Tilton, supra*; *Jeffersonville, etc., R. Co. v. Brevoort, supra*.

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Counsel for appellee, while conceding that the court did not have jurisdiction of the subject-matter of the action stated in the second paragraph, contends, in view of the facts, that the grounds of demurrer are statutory, and that the ground assigned is not known to the statute, that no proper objection to the jurisdiction of the court of the subject-matter was made before the trial court.

It is also insisted that the rule that a judgment rendered without jurisdiction of the subject-matter is void does not apply in this case for the reason that the court did have jurisdiction of the subject-matter stated in the first paragraph, and that this will uphold the judgment; citing *Louisville, etc., R. Co. v. Fox*, 101 Ind. 416.

The statute provides (§342 Burns 1894) that: "The defendant may demur to the complaint when it appears upon the face thereof, either—First the court has no jurisdiction of the person of the defendant or the subject of the action." It is contended that a "cause of action" as used in the demurrer is not synonymous with the phrase "subject of the action" employed in the statute. This question we need not decide, for it has been held by the Supreme and this Court that the want of jurisdiction over the subject-matter can be raised for the first time on appeal by assignment of errors. *Harris v. Harris*, 61 Ind. 117; *Boys v. Simmons*, 72 Ind. 593; *Doctor v. Hartman*, 74 Ind. 221; *Debs v. Dalton*, 7 Ind. App. 84; *Lake Erie, etc., R. Co. v. Rinker*, 16 Ind. App. 334.

In *Louisville, etc., R. Co. v. Fox*, *supra*, the court said: "It is also urged here that the court had no jurisdiction of the cause of action stated in the first paragraph of the complaint for the reason that the value of the heifer was less than \$50, and that therefore the testimony in question should have been excluded." The answer to this position is that no such objection was made in the court below and hence no such question arises here. A party can not resist a ruling below upon one ground and assail it upon

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another here; nor can he clothe his objection in such general terms as to exclude his real point and for the first time develop it here. The objection must be explicit. It will be observed, in reading the opinion, the court uses the phrase "cause of action" and "subject-matter" interchangeably or as substantial equivalents. This is also observed in a number of other cases in the Supreme Court, but the decision is based upon the ground that the court below was not advised of the objection made upon appeal. In the cause before us it is scarcely conceivable that the attention of the court was not called by the demurrer to the question of jurisdiction. The fact was apparent upon the pleadings and upon the face of the statute.

The objection that the demurrer is joint is not well taken. To the second paragraph, it should have been sustained.

Judgment reversed, with instruction to the trial court to sustain the demurrer to the second paragraph of complaint.

BAKER, EXECUTOR, v. CAUTHORN ET AL.

[No. 3,186. Filed January 5, 1900.]

EXECUTORS AND ADMINISTRATORS.—*Liability of Estate for Acts of Executor Prior to His Qualification.—Attorney's Fees.*—An attorney at law who renders services to one named in a will as executor prior to his qualification as such, by the giving of legal advice in reference to certain of his rights and duties in connection with the trust, and in assisting in procuring the bond required of such executor, is entitled to collect his fees for such services as other claims against the estate would be collected.

From the Knox Circuit Court. *Affirmed.*

W. A. Cullop and C. B. Kessinger, for appellant.

H. S. Cauthorn, C. E. Dailey and H. S. Cauthorn, Jr.,
pro se.

HENLEY, J.—Appellees are partners practicing law under the firm name and style of Cauthorn, Dailey & Cauthorn. They commenced this action by filing against the estate

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of appellant's decedent their certain claim for attorneys' fees rendered said estate. The amount claimed is \$100, and is charged in the claim to be as a retainer by the executor and for advice in the matter of said trust. The cause went to trial upon the issues tendered by the claim and the statutory answers, and was submitted to the court for trial without the intervention of a jury, which resulted in a finding and judgment in favor of appellees and allowing the full amount of their claim. Appellant introduced no evidence. At the proper time appellant moved for a new trial upon three grounds, that the finding of the court was contrary to law, was contrary to the evidence, and was not sustained by sufficient evidence. The overruling of appellant's motion for a new trial is the only alleged error assigned in this court. It is contended by appellant that the services rendered by appellees were to the said James E. Baker before he actually became the executor of decedent's will, and that said Baker is individually liable for the value of whatever services were so rendered, and not said estate. It is not contended that appellees were not retained, nor that the advice was not given, nor that the services were not of the value of \$100, but the sole contention seems to be that because the actual work which was done occurred prior to the time appellant in fact qualified as executor; that said Baker was individually liable, and appellees had no claim against the estate which he, Baker, was representing. The facts which are wholly uncontradicted were as follows: Appellant was the husband of one Nancy L. Baker, who died testate, leaving an estate of the value of about \$20,000. Appellant was named by the testatrix in her will as the executor. He consulted with appellees as to whether or not he could under the laws of this State qualify as executor, he having been at the time of his said wife's death a nonresident of the State. He was informed that he could qualify and serve as such executor. He then inquired as to the necessary bond, and was advised that he could give a surety company bond or

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appellees would assist him in giving the bond if desired. Appellant employed appellees to assist him in giving the bond, which was to be in the sum of \$50,000, and the evidence shows that, in appellant's application to the surety company for bond, appellees were named therein as attorneys for the estate. Appellant also at the time retained the firm of attorneys, of which appellees were the individual members, to assist him in the execution of his trust. It is not shown that appellees were ever discharged as appellant's attorneys, but it is shown by the evidence that nothing further in the way of services was required of appellees by appellant, but that they at all times held themselves ready to perform any services demanded of them, and were in a position which prevented them from accepting any employment adverse to the interests of the trust represented by appellant. The evidence is also to the effect that the services were reasonably worth to the estate the sum of \$100, and there is also evidence to the effect that \$100 was a reasonable fee as a retainer in this case, so that if appellees are entitled to anything under the evidence, there can be no contention as to the correctness of the amount. We think the evidence sustains the finding and judgment of the lower court; it shows that the services rendered by appellees were connected with the settlement of his decedent's estate. There was no special agreement between James E. Baker and appellees that they were to look to the estate alone for payment, hence they could if they so desired look to said James E. Baker personally for the value of such services. *Long v. Rodman*, 58 Ind. 58. Appellees waived the right to hold said James E. Baker personally and elected to hold the estate for the value of such services. This they had a right to do. *Long v. Rodman*, *supra*.

Section 2378 Burns 1894, provides as follows: 'No executor named in the will shall interfere with the estate entrusted to him, further than to preserve the same until the

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issuing of letters; but, for that purpose, he may prosecute any suit to prevent the loss of any part thereof." It has been held by the Supreme Court of this State that, contrary to the doctrine of the common law, the executor derives his power and authority over the property from the laws of the State, and not from the will itself. *Calloway v. Doe*, 1 Blackf. 371; *Lucas v. Tucker*, 17 Ind. 41. After the executor has qualified, his authority over the decedent's property reaches back to the time of the decedent's death and covers all acts done by him in the interest of his trust. *Gilkey v. Hamilton*, 22 Mich. 283.

Under the evidence in this case, we think the executor of the will of Nancy L. Baker could have paid the claim of appellees, and rightfully insisted upon its allowance as a credit in his settlement of the trust; not having done this, the only way open to appellees to secure payment for their services from the trust fund was to file the claim against the estate and proceed as the record shows they have done. We find no error in the record. Judgment affirmed.

CITIZENS STREET RAILROAD COMPANY v. HOFFBAUER.

[No. 2,884. Filed January 9, 1900.]

STREET RAILROADS.—Injury to Passengers.—Contributory Negligence.

—Plaintiff entered a street-car after dark which was running backward toward the central part of the city on a single track. At the intersection of a double track the car ran forward on the west track instead of the east, thus placing the running-board extending along the side of the car next to the trolley poles between the tracks. Plaintiff, observing that he was being carried away from his destination, and not knowing that the car was on the wrong track, stepped upon the running-board and started toward the conductor to procure a transfer ticket, when he was struck by a trolley pole and injured. *Held*, that the question of plaintiff's negligence was properly submitted to the jury. pp. 615-623.

SAME.—Evidence.—Contributory Negligence.—In the trial of an action against a street railway company for injury to a passenger while passing along the running-board of the car, evidence that the usual

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and ordinary use of the running-board was for passengers to go from one part of the car to another, and that passengers used it for that purpose, was properly admitted in evidence as showing defendant's knowledge of the general uses of the running-board in determining the question of contributory negligence. *pp.* 623, 624.

INSTRUCTIONS.—Modification.—Practice.—Requested instructions may be modified by the court, and made applicable to the evidence. *p.* 624.

SAME.—Modification.—Practice.—Street Railroads.—In an action against a street railway company for injury to a passenger while standing on the running-board of the car, an instruction requested by the defendant to the effect that if the passenger did certain things he was guilty of contributory negligence and could not recover was properly modified so as to define the general use of the running-board, where there was evidence showing the general use of the running-board by passengers. *pp.* 624, 625.

SAME.—Evidence.—An instruction in the trial of an action against a street railway company which assumed that the car was running backward at the time of plaintiff's injury was properly refused where the undisputed evidence showed that the car was running forward at the time of the injury. *p.* 625.

SAME.—Invading Province of Jury.—An instruction in the trial of an action for personal injuries that if the jury found for plaintiff they might take into consideration the nature of his injuries, any physical or mental pain which he has suffered, as shown by the evidence, also any expense incurred for medical attendance, and any loss of time, loss of wages or employment, and give him such damages as will compensate him for the injuries he has sustained, not exceeding the amount named in the complaint, is not objectionable as assuming the truth of facts in issue. *pp.* 625, 626.

SAME.—Invading Province of Jury.—Street Railroads.—An instruction in an action against a street railway company for personal injury to a passenger while on the running-board of the car, that if defendant was running the car in question so that the running-board was on the side next to the trolley poles, and that defendant was running the car without giving any warning to passengers of danger from the trolley poles, that such acts would constitute negligence, was erroneous, and an invasion of the province of the jury. *pp.* 626-630.

From the Marion Superior Court. *Reversed.*

Ferdinand Winter and *W. H. Latta*, for appellant.

J. W. Kealing and *O. B. Iles*, for appellee.

ROBINSON, J.—Action for damages for personal injuries. Appellee was a passenger on appellant's car, and while pass-

ing from his seat along the foot-board of the car was struck by a trolley pole near the track. Demurrers to each of the two paragraphs of complaint overruled. Answer of general denial. Jury returned a general verdict for appellee with answers to interrogatories. Appellant's motions for judgment on the answers, and for a new trial, were overruled.

The first paragraph of complaint avers that on August 2, 1895, appellee became a passenger on one of appellant's cars running on Hill avenue, Indianapolis, intending to go to the central portion of the city; that, at the time the car was backing on Hill avenue, in a westerly direction towards the central portion of the city; that Hill avenue has no poles between or immediately near the tracks; that he took a seat on the rear seat as such car was backing down; the car was an open or summer car, with a platform or running-board lengthwise on one side to permit the ingress and egress of passengers, the opposite side being screened and guarded to prevent passengers from entering or leaving the car on that side, and which side was placed and run next to the center or pole side of the tracks where poles were maintained; that appellant maintained a double track running north on Columbia avenue, and between the tracks maintained poles dangerously near the tracks; that appellant ordinarily ran cars north on Columbia avenue on the east or right-hand track, with the closed side of the car next to the poles, and the running-board side on the east or outside of the track to permit with safety the entrance and alighting of passengers; that when the car reached Columbia avenue en route to the central portion of the city, appellant, instead of proceeding down to the central portion of the city, proceeded north up Columbia avenue, and instead of running the car on the east track, as such cars run ordinarily, it was negligently and carelessly run on the west track, thus placing the running-board next to the iron poles; that the employes in charge of the car negligently failed to warn appellee of the danger from the poles; that when the car passed up Columbia ave-

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nue the seat occupied by appellee was so arranged that his back was towards the motorman, and his face towards the conductor; that appellee believed the car was being run on the east track as ordinarily; that he could not see and did not know the car was on the west track with the running-board next to the poles; that his position was such that he could not and did not see the poles nor danger of stepping on the running-board; that the car was negligently run at a great rate of speed; that when appellee discovered the car was going north on Columbia avenue, and believing the same would continue north, and being desirous of reaching the central portion of the city, without fault on his part, and totally ignorant of the danger of stepping upon the running-board, ignorant of the fact that the car was on the west track, and without opportunity of knowing and observing the same, and believing the car was on the east track, and relying and believing that the car was being properly managed, stepped upon the running-board and started towards the conductor, who stood at the rear end, to procure a transfer ticket to a south bound car, intending to alight and proceed to his destination; that the conductor negligently and carelessly failed to warn appellee of his danger, and negligently failed to signal the car to stop; that while moving along the running-board toward the conductor, in plain view of the conductor, and totally unconscious of the danger, and without fault on his part, and wholly because of the carelessness and negligence of appellant, he was struck by one of the poles near the track and injured.

The second paragraph, omitting the averment as to speed of car, contains additional averments that appellant had negligently constructed its tracks, in that no provision was made by which cars backing on Hill avenue, in case of accident or otherwise, could enter the east track on Columbia avenue with the running-board away from the poles; that the car was constructed with seats running crosswise, and with a running-board by the side of and along the

entire length of the car for the use and convenience of passengers entering the same; that the conductor saw appellee as he stepped on the running-board and started towards him, but negligently failed to warn him of his danger; that cars on Hill avenue are ordinarily run past Columbia avenue tracks down to the city; that when appellee stepped on the running-board he could not, because of darkness, see the poles or the danger of collision with them.

The discussion of the questions reserved, as stated in appellant's brief, covers practically the same ground, so far as the legal effect of each of the assigned errors is concerned. The discussion is directed to the questions of appellant's negligence, and appellee's freedom from fault.

The special answers show that appellee, at 7:30 p. m., August 2nd, became a passenger and was furnished a safe seat on an open or summer car with a running-board the entire length on the right side, and on the left side a screen to prevent passengers from getting in or out; that the car was on Hill avenue running backward, which appellee knew; the track on Hill avenue connected with a double track at Hill, Home, and Columbia avenues, so cars could pass on the west track of Columbia avenue and thence on the north track of Home avenue to the city; that the car backed on the west track of Columbia avenue, which threw the running-board next to the poles, and proceeded northward to be turned and run to the city with the running-board away from the poles; that the car had gone about 150 feet, at a speed of not less than four miles an hour, when appellee left his seat and got out on the running-board, and after walking three or four feet toward the rear end of the car was struck by one of the poles between the tracks; that before getting out on the running-board appellee did not look to see if there was any danger in doing so, did not signal the conductor or motorman, but got out of his own volition; that the conductor had no knowledge that appellee would leave his seat and get out on the running-board, and

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that the car, with the exercise of ordinary care, could not have been stopped after he got on the board and before he was struck; after passing on the west track the conductor did not notify the passengers to look out for the poles; that the conductor after he saw appellee upon the running-board could not have warned him of danger from the poles in time to prevent the injury; that the running-board was used by passengers in passing to the rear of the car; that the outer edge of the board was within a few inches of the poles; that there was no switch at the intersection of the north track on Hill avenue and the east track on Columbia avenue; that appellee knew that cars backing down Hill avenue in case of accident could not enter on the east track of Columbia avenue; that appellee did not know the car had entered on the west track on Columbia avenue; that he was sitting with his back toward the poles, and did not know the running-board was next to the poles; that it was growing dark, and appellee did not see the poles; that before stepping on the running-board appellee arose to his feet and looked at the conductor, who saw appellee; that he did not see the poles when he rose to his feet or stepped on the board; that no warning of any kind was given by the conductor or by any person to the appellee; that at the time objects outside the car could not be distinctly seen; that under all the circumstances appellee exercised such care as would be exercised by an ordinarily prudent person under like circumstances.

The complaint charges negligence on appellant's part, in that the car, under the particular circumstances enumerated, was run on the west track on Columbia avenue, with the running-board next to the poles, instead of the east track, and that appellant failed to warn the passengers of danger from the poles while the car was so running; that, after appellee left his seat and got on the board, appellant's conductor, who saw him, failed to warn him of the danger, or stop the car; and the negligent construction of the track, and switch at

the intersection of the tracks, and the location of the poles between the tracks. As there was no evidence to support this last charge, it need not be further noticed.

It is a well settled rule that a carrier of passengers is held to the highest degree of care and diligence for the safety of passengers, consistent with the mode of conveyance employed. This rule has been differently stated by different courts, and in this State it is held that in cases of this character the omission to exercise the highest degree of practicable care constitutes negligence, while in other cases the failure to exercise ordinary care constitutes negligence. *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, 10 Am. St. 60, 3 L. R. A. 434; *Anderson v. Scholey*, 114 Ind. 553; *Citizens St. R. Co. v. Twiname*, 111 Ind. 587; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168, and cases cited. *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228.

And the duties imposed by the law upon those who operate steam railways is not the same as that imposed upon those who operate street railways. The principles of law which govern these two systems of transportation are not altogether the same although many general rules are applicable to both. *Anderson v. Citizens St. R. Co.*, 12 Ind. App. 194; *Cogswell v. West St., etc., R. Co.*, 5 Wash. 46, 31 Pac. 511, 52 Am. & Eng. R. Cas. 500.

A street railway engaged in the carriage of passengers is not an insurer; but it must use every reasonable precaution in the management and operation of its cars. And its duties in this regard are not the same when it is operating its cars in the usual manner as when in an unusual manner. If the car is run in an unusual manner, and a danger arises therefrom which does not ordinarily exist, it is the company's duty to warn passengers of such danger. A passenger has the right to presume, in the absence of knowledge or warning to the contrary, that all necessary precautions have been and will be taken for his safe transportation. The care and

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vigilance required in operating an open car may be greater than that required in operating a closed car. If a danger approaches of which the passengers are ignorant they should be notified so they may take steps to avoid it. As sustaining these propositions see: *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Chicago City R. Co. v. Rood*, 62 Ill. App. 550; *North Chicago, etc., R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958; *Elliott v. Newport St. R. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208; *Covington, etc., St. R. Co. v. McCleave* (Ky.), 38 S. W. 1055; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667; *Booth Street Railroads*, §§309, 327, 360; *Spellman v. Transit Co.*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316; *McLean v. Burbank*, 11 Minn. 277.

It is evident that a passenger might leave his seat in the car, and go upon the running-board, under circumstances which would require a court to say, as matter of law, that he was guilty of negligence, and assumed the risk of contact with things outside the car. But in the case at bar what were the circumstances? Appellee had entered a car running backwards where there was a single track. He soon found the car was carrying him away from his destination, and was running head end first, as cars were usually run. The conductor was at the rear end of the car. He had paid his fare to the city, and wanted a transfer. He was anxious to get to the city to keep an appointment. This transfer he must get from the conductor. The foot-board was ordinarily used by passengers to go from seat to seat and to the rear end of the car. The car was apparently on the right-hand track, with the running-board away from the poles. Cars on that line generally passed up the right-hand track. It was growing dark, and there was nothing to indicate to him that the car was on the left track and the running-board next to the poles. He had no warning that it was dangerous to use the foot-board. He did not know that the car had passed on the left track at the switch. Were not the cir-

cumstances and conditions surrounding him such as, in the absence of warning, would tend to deceive an ordinarily prudent person? Whether or not he was negligent in what he did was a question for the jury. The conditions and circumstances were not such that we can say, as matter of law, that his own negligence contributed to his injury. It was proper to submit to the jury the question of his negligence, and they not only answered the question in his favor in the general verdict, but in answer to an interrogatory they say that, under all the circumstances of the case, appellee at the time of the injury, exercised such care as would be exercised by an ordinarily prudent person under like circumstances. Thus it is said: "It is plain, however, we think, that in very many cases the question as to whether a person injured at a crossing exercises ordinary care under the particular circumstances, is one for the jury. The court can not adjudge that negligence exists as a matter of law in any case, unless the facts are undisputed, and the conclusions to be drawn therefrom are indisputable. 'The question of negligence must be submitted to the jury as one of fact not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might fairly be drawn from conceded facts.' " *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39, and cases there cited. 1 Shear. & Redf. Neg. (5th ed.), §54; Beach Contr. Neg. (3rd ed.), §§449, 450; *Dahl v. Milwaukee City R. Co.*, 62 Wis. 652, 22 N. W. 755; *Hoye v. Chicago, etc., R. Co.*, 62 Wis. 666, 23 N. W. 14; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576; *Watkins v. Birmingham, etc., R. Co.*, (Ala.), 24 South. 392, 43 L. R. A. 297.

There are cases where the courts have defined what "ordinary care under the circumstances" means; as, where a person approaches a railroad crossing, he must look for trains and warnings, must listen for signals, and must not attempt

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to cross in front of a moving train. Failure to observe these precautions is, as matter of law, contributory negligence. The kind and exact quantity of care to be used is prescribed. The jury have the standard fixed for them. If they find facts which show a failure to attain that standard, the law declares negligence exists. The conduct of the complaining party in such cases is such as to shock the mind of an ordinarily prudent person and shows a plain disregard for common care and caution. In such cases a court may well say that the party's conduct showed a plain and reckless disregard for his own safety. But a court may not declare that negligence does or does not exist in any case simply because the facts are undisputed. But the question is, even though the facts be undisputed, is there room for difference of opinion as to the inferences and conclusions that may be drawn from these undisputed facts? If the inference of negligence, or its absence, necessarily follows from the undisputed facts, it is a question of law; if not, it is for the jury. "In the ultimate determination of the question," says Beach on Contr. Neg. (3rd ed.), §452, "whether the plaintiff was guilty of negligence, two separate inquiries are involved: first, what was ordinary care under the circumstances? and second, did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care it may be remarked that it is not always a fixed standard, and in many cases it must first be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard."

Taking all the circumstances and conditions existing at the time the injury was received, there was no error in the court's refusal to instruct the jury to find for appellant because of the contributory negligence of appellee.

There was no error in permitting witnesses to testify that the usual and ordinary use of the running-board was for passengers to go from one part of the car to another, and

that passengers used the running-board for that purpose. The averments of the complaint were broad enough to admit the evidence. The company could not deny permit a certain part of its car to be used for certain purposes by passengers, and then be heard to say it was not liable for an injury to a passenger so using the car, because that particular part was constructed for another purpose. But the evidence was competent, because appellee's knowledge of the general uses of the running-board became material in determining the question of contributory negligence.

Instruction five and one-half requested by appellant, and refused, was to the effect that it is the duty of the carrier to provide seats which are safe for the carriage of its patrons, and that it is the duty of a passenger to take such seat so provided, and remain in the same until he has reached his destination; the passenger having the right to rely upon the obligation of the carrier to transport him to his destination without himself taking any concern as to the route or direction of the car or the manner of its operation. This instruction was properly modified by the court and made applicable to the evidence. There was evidence that passengers ordinarily used other parts of the car for certain purposes with the knowledge and consent of the company.

The seventh instruction requested, and refused, left out of consideration the fact of the general use of the running-board by passengers. This instruction was embodied in an instruction given by the court, although in the court's instruction the jury were told that if the passenger did certain things he was guilty of negligence, and could not recover, and the instruction requested was to the effect that, if the passenger did certain things, he assumed the risk, and could not recover. The instruction given by the court included the principle contained in the instruction requested, and also told the jury that where the usual and customary manner of running the car was with the running-board opposite the trolley poles, which customary manner was

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known to the passenger, and if the car is in fact running with the running-board next to the poles, which fact the passenger does not know, then the passenger would not be held to the same degree of negligence in looking for poles as he would had he known of such irregular running; but that, in any event, he must use reasonable and ordinary care under all the circumstances to ascertain approaching danger.

When appellee in the case at bar went upon the foot-board he took upon himself the duty of looking out for himself against the usual and obvious peril of the place, as long as the car was operated and managed in the usual manner. But the danger of being hit by a trolley pole while on the foot-board was not such a danger as he was bound to anticipate when the car was running in the unusual manner of having the foot-board next to the trolley poles, and he had no knowledge that it was so running. In the absence of knowledge, he had the right to assume that the car was properly managed and was running with the foot-board away from the poles, and that there was no danger from trolley poles while on the foot-board. His failure to look ahead was not necessarily negligence unless he had reason to anticipate danger. He had the right to assume that appellant was running the car in the usual manner, and that it would perform its duty in guarding the safety of its passengers. See *City R. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883; *Dickinson v. Port Huron, etc., R. Co.*, 53 Mich. 43, 18 N. W. 553.

The thirteenth instruction requested was properly refused, because it assumes the car, at the time of the injury, was running backwards. The evidence is undisputed that at the time of the accident the car was running head end first. A party making a proper request is entitled to a specific charge upon his theory of the case if there is material evidence fairly tending to support it.

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The eleventh instruction is as follows: "If you find for the plaintiff then in estimating his damages you may take into consideration the nature and extent of his injuries, whether the same are permanent or temporary; you may also take into consideration any physical or mental pain which he has suffered, as shown by the evidence, any loss of time, loss of wages or employment; also any expenses incurred for medical and surgical attendance or for nursing, and from all the surrounding facts, as shown by the evidence, you will give to him such damages as will compensate him for the injuries he has sustained, not, however, exceeding the amount named in the complaint."

An instruction to the jury can not assume the truth of facts in issue between the parties. But the above instruction is not open to this objection. Taking the instruction as a whole we do not see how any juror of average intelligence could fail to understand that he was required to be guided by the evidence. *City of Indianapolis v. Scott*, 72 Ind. 196; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409.

Appellee testified that he was a policeman when injured, that he had never lost any pay as such officer since the accident, and that he had drawn his pay every day. The court should not have included in the instruction the expression, "loss of wages, or employment." But we can not say that such error is reversible error. The instruction taken as a whole means that if the evidence shows loss of wages or employment the jury may consider them. That part of the instruction was not applicable to the evidence, but as its inapplicability was not presumably injurious we can not reverse the case on that ground.

The seventh instruction to the jury reads: "If the jury find from the evidence that at the time of the accident in controversy the defendant was running the car in question and on which the plaintiff was a passenger north on Columbia avenue upon the west track of its Columbia avenue line, so that the running-board of said car was on the side next to

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the trolley pole, and that the defendant was running the car in question without giving any warning to the passengers on said car, or to the plaintiff, of danger from the trolley poles, then such acts on the part of the defendant's employes would constitute negligence on the part of defendant."

Appellee testified that the conductor, who was on the rear platform of the car, saw him as he arose from his seat, and as he was going back towards him on the running-board. There was evidence that no warning was given the passengers.

The care and diligence required of carriers of passengers is expressed variously by the different courts, but all are agreed that the highest degree of care is required to prevent injury to passengers. Thus in *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, it is held that street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence. In *Maverick v. Railroad Co.*, 36 N. Y. 378, the court say: "Passenger carriers bind themselves to carry safely those who they take into their coaches to the utmost care and diligence of very cautious persons." In *Wheaton v. North Beach, etc., Co.*, 36 Cal. 590: "Passenger carriers by their contract bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons." In *Sales v. Stage Co.*, 4 Iowa 546: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." In *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, it is said: "The highest degree of carefulness and diligence is expressly exacted. * * * The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public

policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. * * * But it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier, and the means of conveyance employed." See, also, *New York, etc., R. Co. v. Lockwood*, 17 Wall. 357; *Derwort v. Loomer*, 21 Conn. 245; *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606, 18 N. W. 380; *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Hammond, etc., R. Co. v. Spyzchalski*, 17 Ind. App. 7.

Not only is this high degree of care and caution required of the carrier, but where an injury occurs to a passenger through a defect in the car, or from its management and control, or from anything pertaining to the service which the company ought to control, the law will presume negligence on the part of the company. *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462; *Peoria, etc., R. Co. v. Reynolds*, 88 Ill. 418; *Seyboldt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Feital v. Middlesex, etc., R. Co.*, 109 Mass. 398; *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461; *Denver, etc., R. Co. v. Woodward*, 4 Colo. 1; *Stokes v. Saltonstall*, 13 Pet. 181; Booth, Street R. Law, §361.

In Hutchinson on Carriers, §637, it is said: "But, as we have seen, he owes to his passenger not only the duty of transportation, but that of exercising for his safety the utmost care and diligence compatible with the nature of the carriage, and the further duty of protecting him against the assaults and trespasses of other passengers and of strangers while upon his conveyance. He owes him the still further duty, as has been shown, of warning him against danger when it is at hand, and of cautioning him against

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acts of imprudence which may endanger his person, whenever the circumstances are such that the safety of the passenger would seem to require it." See Wharton on Neg. §649.

In this instruction the court says that if certain acts are shown the company's negligence is shown; in other words, that such acts are negligence *per se*. The instruction, in effect, states an abstract principle of law. It is true the instruction is to be construed in connection with all the other instructions in the case, and it is limited to the time and place of the accident. But it is in effect a statement to the jury that certain acts are negligence *per se*. The principle stated in it is not qualified by any facts or circumstances that may have existed at the time. The question is thus presented whether the instruction did not take from the jury the right to find the ultimate fact of negligence.

While negligence is not capable of definition after the fashion of the exact sciences, yet courts are under the necessity of giving the term a meaning. They can not say that negligence does or does not exist without defining its meaning, and when a text-writer says that the term can not be defined he can mean no more than that the term can not be given a universal definition. In the case at bar the trial court told the jury that "Negligence, whether on the part of the plaintiff or of the defendant, may be defined as the want of ordinary or reasonable care in respect of that which it is the duty of a party to do or to leave undone." As applied to the particular case, this definition is not open to objection. Based upon this definition the negligence of appellant consisted in the want of ordinary or reasonable care for the safety of its passengers while so running its car. But it must be admitted that this want of ordinary or reasonable care may depend upon a number of circumstances existing at the time. The instruction is not qualified with respect to the necessity of operating a car at times on the wrong track, or of the passenger's knowledge of the conditions,

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and other circumstances which might exist. The conditions existing at the time may have been such that the safety of the passengers would not seem to require any warning. The jury were told that if they found the two facts, namely, that the car was on the wrong track, with the running-board next to the poles, and that the passengers were not warned, negligence was shown. This was taking from the jury the question which they should decide from all the facts and circumstances existing at the time. Although the carrier of passengers is held to the highest degree of care, it will not do to say that this care is the same under any and all circumstances. It is true that contributory negligence as matter of law has been declared under certain facts, but the rule is based upon the injustice of allowing a party who has shown an utter disregard for his own safety to complain of another's negligence. And where a statute or municipality has prescribed a certain duty a failure to perform that duty has been, by the courts, declared to be negligence. The rule exists because of the statute, and until the statute it did not exist. For the reasons above given, we think the seventh instruction is too broad, and should not have been given.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Henley, J., concurs in conclusion reached.

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[No. 2,848. Filed May 19, 1899. Rehearing denied Jan. 9, 1900.]

PLEADING.—*Complaint Questioned for First Time on Appeal.*—When a complaint, questioned for the first time in the assignment of errors, is sufficient to bar another action for the same cause, it will be held good. p. 631.

CONVERSION.—*Complaint.*—A complaint for conversion alleging that defendant, as agent and employe of the plaintiff, received from the latter certain goods, wares, and merchandise to be sold for defendant, and that plaintiff converted a part of such goods to his own use,

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sufficiently avers ownership by the plaintiff in the property converted, as against an objection raised for the first time in the assignment of errors. pp. 631-635.

From the Marion Superior Court. *Affirmed.*

L. B. Eurbank and *B. F. Watson*, for appellant.

W. V. Rooker, for appellee.

COMSTOCK, J.—Suit for conversion. Verdict and judgment in the court below in favor of appellee for \$237.70.

Appellant assigns as error the action of the court in overruling (1) his motion for a new trial; (2) his motion to set aside the judgment. The third specification of error is that the complaint does not state facts sufficient to constitute a cause of action. It is argued that the complaint is defective for the reason that it does not contain an averment of ownership by appellee of the property alleged to have been converted. The sufficiency of the complaint is challenged for the first time in this appeal. If either paragraph is sufficient, the claim must fail. The third paragraph alleges that at certain dates named, appellant, as the agent and employe of the appellee, received of and from him goods, wares, and merchandise in the sum of \$2,200.11 to be sold by defendant for plaintiff and accounted for to plaintiff at the sum and price of \$1,804.11; that defendant sold and accounted to plaintiff for said merchandise in the sum of \$1,539.16; that a bill of particulars of said goods is filed with the complaint as an exhibit; that the rest of said merchandise, and the proceeds accruing from the sale thereof of the value of \$300, the defendant converted to his own use, and embezzled, etc.

When a complaint is sufficient to bar another action for the same cause, and it is questioned for the first time in the assignment of errors, it will be held good. Waiving the question whether the complaint is insufficient as between bailor and bailee upon demurrer, we are clearly of the opinion that it is sufficient to bar another action for the same cause, and must, therefore, under the rule, hold it to be sufficient. The complaint shows a right of action in appellee

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sufficient to put appellant upon answer. This also disposes of the second specification of error, viz., that the court erred in overruling appellant's motion to set aside the judgment on complaint urged upon the ground that there was no sufficient complaint upon which to go to trial. Under the first and remaining specification of error, the overruling of the motion for a new trial, appellant discusses the action of the court in giving instructions one, five, and nine. No attempt is made to make the evidence a part of the record. There is no bill of exceptions, and while there appears at the close of each of said instructions the words "given and excepted to," signed by the judge of the trial court and dated, it does not appear by whom the exception was taken. This assignment, so far as discussed by appellant, presents no question for the determination of this court. Judgment affirmed.

ON PETITION FOR REHEARING.

COMSTOCK, J.—Appellant asks for a rehearing in this cause upon the grounds, (1) that the court erred in holding the third paragraph of the complaint sufficient to withstand an attack made for the first time upon appeal; (2) in holding that a complaint in an action for conversion which is sufficient to bar another by the same plaintiff for the same cause will be held good if it is questioned for the first time by an assignment of errors. In support of the petition, counsel for appellant have industriously collected and cited many cases. The following are cited from our own courts to show that ownership of the plaintiff is an essential material averment in a complaint for conversion. *Day v. Watts*, 92 Ind. 442; *Kehr v. Hall*, 117 Ind. 405; *Ryan v. Hurley*, 119 Ind. 115; *Kidder v. Biddle*, 13 Ind. App. 653; *Noblett v. Dillinger*, 23 Ind. 505.

In *Day v. Watts*, *supra*, the complaint alleged that the defendants with force and arms wrongfully and forcibly took from the plaintiff, and carried away and converted to

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their own use, certain property. A motion in arrest of judgment was overruled by the circuit court. In reversing the judgment, the Supreme Court said: "However wrongful the taking of the property in this case may have been in a moral point of view, or considered abstractly, the plaintiff had no right to maintain this action, unless he had at least some special or qualified interest in the property which was either impaired or destroyed by the wrongful act of the defendants. * * * The allegation that the property described in the complaint was wrongfully and forcibly taken from the plaintiff cannot be justly construed as amounting to an averment that the property belonged to him."

The complaint avers no fact showing an interest in the property except that it was taken from his possession.

In *Kehr v. Hall*, 117 Ind. 405, the court said: "The second paragraph of the complaint is, in our opinion, bad. It is alleged that the appellee was directed by the Elkhart Circuit Court to take possession of the property in the chattel mortgage described, and that he demanded possession thereof of the appellants, and they refused to surrender the possession, but converted the property to their own use wrongfully. It is not alleged that the appellee ever had possession of the property, but the inference to be drawn from what is alleged is that he never had the possession thereof. From all that appears in this paragraph of the complaint, it does not appear that the appellee was entitled to the possession of the property."

In *Ryan v. Hurley*, 119 Ind. 115, the second paragraph of the complaint was held bad because it was not averred that the horse alleged to have been converted was of any value, or that the plaintiff sustained any damage by reason of such conversion.

In *Kidder v. Biddle*, 13 Ind. App. 653, the third paragraph of the complaint was for conversion. The court said: "It is insisted that the demurrer should have been sustained

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to the third paragraph, for the reason that it does not aver that appellees had a general or special property in the money therein referred to, or that they were entitled to the possession thereof at the time of the alleged conversion. As to the objections mentioned, the first and third paragraphs of the complaint are sufficient. It clearly appears in the first paragraph, that appellees furnished its acceptance to the corporation for the express purpose of paying the note, and in the third paragraph it is expressly averred that appellees furnished the appellant the money for that purpose." The court held that an action either for conversion or for money had and received may be brought against one to whom the money is sent with directions to pay a particular debt due from the sender to a third party, when he in disregard of such directions converts the money to the use of some one else.

Noblett v. Dillinger, 23 Ind. 505, was a suit for conversion of a promissory note. The second paragraph of complaint avers that the note was the property of the husband of the plaintiff, who died, leaving property worth less than \$200; that the plaintiff had filed her petition in the court of common pleas alleging that fact; that appraisers had been appointed, who had returned an inventory and appraisement of such property, including the note, amounting to \$289; and that the proceedings upon her petition were yet pending; that the note was obtained by the defendant wrongfully. Held that the order of the common pleas court ordering the delivery of the property to her was necessary to give her title thereto, and that the suit was prematurely brought.

We do not deem it necessary to refer in detail to the numerous other cases cited in appellant's brief. They are to the effect that a plaintiff must aver in such an action ownership of the property, or, as was said in *Day v. Watts*, 92 Ind. 442, "Some special or qualified interest in the property, which was either impaired or destroyed by the wrong-

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ful act of the defendant." The complaint shows the existence of the relation of principal and agent between appellee and appellant; the receipt from the possession of appellee of the property in question by appellant, to be sold by appellant for the appellee and accounted for to him at a certain sum; that he sold and accounted for a portion of it; and that "the rest of the merchandise and the proceeds arising from the sale thereof" he converted to his own use and embezzled, to the damage of plaintiff, etc.

The cases cited by the appellant do not show a fiduciary relation between the parties. The transactions were between strangers. The one was as much entitled to the possession of the property in controversy as the other. In the cause before us, the parties determined by their agreement their respective attitudes with respect to the property toward one another. Appellant accepted the position of agent of his principal, the appellee. He recognized his principal as the owner of the property with reference to which he contracted, or at least as entitled to its possession and control. This right, as agent, he could not question. Under the law, a principal suing his agent for conversion need make no demand for the return of the property before bringing suit, the law recognizing his right where such relations exist to the property. The complaint shows a violation of his trust.

The case of *Yardman v. Wolf*, 54 N. Y. Supp. 192, is in many of its features similar to the case at bar. It is stated (quoting the syllabus, which is borne out by the text): "A complaint for conversion, alleging that certain rugs were delivered by plaintiffs to defendant as a factor, to be sold, and that defendant refuses to account,—i. e. to state how many rugs have been sold by him,—which, by virtue of their agreement, gives plaintiffs the immediate right to demand a return of the goods on hand, and of the proceeds of any that have been sold, sufficiently alleges a right of possession to sustain the action." In the opinion the court

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said: "Nor is the objection that the complaint does not allege ownership nor right of possession of plaintiffs well taken. It is true that ownership or right of possession must be pleaded and proved to sustain an action for conversion, but so far as the pleading is concerned, it is sufficient if facts are set forth which show property or right of possession in the plaintiffs." See, also, *Rauh v. Stevens*, 21 Ind. App. 650, and the authorities there cited.

In the following cases our courts have held that where a complaint is questioned for the first time upon appeal, it will be held good, if it is sufficient to bar another action for the same cause. *Burkhart v. Gladish*, 123 Ind. 337; *Citizens St. R. Co. v. Willooby*, 134 Ind. 563; *DuSouchet v. Dutcher*, 113 Ind. 249; *Chapell v. Shuee*, 117 Ind. 481; *Colchen v. Ninde*, 120 Ind. 88; *Beal v. State, ex rel.*, 77 Ind. 231; *Field v. Burton*, 71 Ind. 380; *Donellan v. Hardy*, 57 Ind. 393; *Harper v. Pound*, 10 Ind. 32; *Bertha v. Sparks*, 19 Ind. App. 431.

In *Burkhardt v. Gladish, supra*, the court said: "The sufficiency of the complaint is questioned for the first time in this court, and when so questioned it is settled that if the complaint would be good after verdict, or is sufficient to bar another action for the same cause, it is sufficient to withstand such an attack."

In *Citizens St. R. Co. v. Willooby*, 134 Ind. 563, the court said: "It is a well settled rule that where the sufficiency of a complaint is tested for the first time by the assignment of error in this court, it will be held sufficient, if it contain facts enough to bar another action for the same cause."

It may be that the Supreme Court and this Court, in the foregoing cases have too broadly stated the rule as to the sufficiency of a complaint when questioned for the first time upon appeal. As to this we give no opinion, but the complaint clearly shows such an interest in the property in question as between the principal and agent as to make it

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sufficient to bar another action between the parties for the same cause. Petition for a rehearing overruled. Black, J., and Henley, J., dissent.

DISSENTING OPINION.

HENLEY, J.—The complaint in this case, omitting the formal parts, is in the following words: "Addison H. Nordyke, plaintiff, for a cause of action against Charles N. McCreery, defendant, says that, heretofore, on and between the 26th day of September, 1895, and the 11th day of March, 1896, the defendant, as agent and employe of the plaintiff, received of and from plaintiff goods, wares, and merchandise of the value of \$2,200 to be sold by defendant for plaintiff and accounted for to plaintiff at the sum and price of \$1,804.11; that the defendant sold and accounted to plaintiff for said merchandise in the sum and amount of \$1,539.16; that a bill of particulars of said goods and credits marked Exhibit A is filed herewith; that the rest and residue of said merchandise, and the proceeds arising from the sale thereof, of the value of \$300, the defendant unlawfully converted to his own use, and embezzled, to the damage of plaintiff in the sum of \$500, whereby plaintiff demands judgment for \$500 and all proper relief."

The complaint is attacked for the first time upon appeal, by the assignment of error that the complaint does not state facts sufficient to constitute a cause of action. It will be observed that the complaint is for conversion. It is the recognized law of this State that the complaint, to withstand a demurrer for want of sufficient facts in an action for conversion, must allege that the plaintiff is the owner of the property or entitled to its possession at the time it is converted. These are material averments which are absolutely necessary to be alleged and proved in order to maintain the action. *Day v. Watts*, 92 Ind. 442; *Ryan v. Hurley*, 119 Ind. 115; *Kidder v. Biddle*, 13 Ind. App. 653; *Easter v.*

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Fleming, 78 Ind. 116. We think the rule is thoroughly established in this court that, where a complaint is attacked for the first time on appeal, the assignment will be available if it appears that a material averment has been omitted from the complaint. *Western Assurance Co. v. Koontz*, 17 Ind. App. 54; *Dickey v. Kalfsbeck*, 20 Ind. App. 290; *Bertha v. Sparks*, 19 Ind. App. 431; *Metropolitan Ins. Co. v. McCormick*, 19 Ind. App. 49; *Dotson v. Dotson*, 13 Ind. App. 436; *Harter v. Parsons*, 14 Ind. App. 331; *Town of Ladoga v. Linn*, 9 Ind. App. 15; *Mansur v. Streight*, 103 Ind. 358; *Cox v. Hunter*, 79 Ind. 590; Elliott's App. Proc. §472. It is also the law in this State that when the complaint is sufficient to bar another action for the same cause, and it is questioned for the first time upon appeal, it will be held good. These decisions are not conflicting. A complaint which wholly fails to aver some material fact would not be sufficient to bar another action for the same cause. On account of the failure of the complaint in this cause to allege either ownership or right of possession in the plaintiff in the goods alleged to have been converted, I think the complaint should be held bad, and the case reversed for that reason.

PARRILL ET AL. v. CLEVELAND, CINCINNATI, CHICAGO
AND ST. LOUIS RAILWAY COMPANY.

[No. 2,984. Filed January 10, 1900.]

CARRIERS.—*Shipment of Live Stock.—Loss in Transit.—Pleading.—Complaint.—Tort.*—In an action against a railroad company for loss of live stock in transit, the complaint alleged that plaintiff delivered to defendant certain live stock, to be transported by it as a common carrier; that the animals were loaded on a car furnished therefor by defendant, said car having open spaces at the sides and ends, and were bedded with hay, which was liable to be set on fire by sparks from the engine; that defendant, well knowing these conditions, placed the car near the engine, which had negligently been permitted to be and remain out of repair, by reason whereof, and by reason of its negligent and careless operation, sparks were

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emitted from the engine, the hay ignited and the live stock burned; wherefore plaintiff was damaged, etc. The defendant company filed answer in denial. *Held*, that the complaint stated a cause of action in tort, and that there could be no recovery where the evidence, on the trial, showed that the shipment was made under a written contract which, among other things, exempted the defendant from liability for any injury to the live stock caused by the burning of hay, straw, or other materials used for feed or bedding. pp. 639-656.

ELECTION OF REMEDIES.—Contract.—Tort.—Where there is no legal duty except that arising from a contract, there cannot be an election between an action on contract and one in tort. p. 648.

CARRIERS.—Contract.—Notice.—Where a contract between a shipper of live stock and a common carrier provides for reasonable notice of claim, the giving of such notice being a condition precedent, it is a part of the plaintiff's cause of action to show performance of this precedent obligation on his part, or to show a waiver of performance. p. 653.

SAME.—Limitation of Liability.—Negligence.—Where live stock is shipped under an express contract, which relieves the carrier from liability for loss occasioned by a specified cause, the carrier is not liable for loss occasioned by such cause, if the carrier was itself without fault or negligence. p. 652.

From the Grant Superior Court. *Affirmed*.

Austin DeWolf, for appellants.

C. E. Cowgill, for appellee.

BLACK, J.—The appellants, as partners, sued the appellee, alleging in the complaint that the appellee was a common carrier of goods from Fairmount, in Grant county, Indiana, to Anderson, in Madison county, Indiana; that on the 18th of October, 1897, the appellants delivered to the appellee certain hogs, sheep, and calves, the number and value of each class being stated, all of the value of \$770; that these animals were to be carried by the appellee from said Fairmount by way of said Anderson to East Buffalo, New York; that they were loaded in a car furnished by the appellee, having open spaces in the sides and ends, and were bedded with hay, which was combustible and liable to be set on fire by sparks and cinders; that the appellee received said animals so loaded and bedded, well knowing that said hay was

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combustible and liable to be ignited by sparks and cinders; that on said day the appellee undertook to convey said car of stock from said Fairmount, by way of said Anderson to said East Buffalo, by placing said car in a train of cars used for hauling freight, composed of twelve or fifteen box cars; that the spark-arrester on said engine used by the appellee in hauling said cars was out of repair, and the appellee carelessly and negligently operated said engine, "and by reason of said want of repair, and carelessly and negligently operating the same, it emitted sparks when employed in hauling said cars;" that the appellee, well knowing the premises, placed, kept, and hauled the car containing said animals in a dangerous and hazardous place near said engine; and that by and through want of repair of said spark-arrester, and the careless and negligent handling of said engine while hauling said car, sparks and cinders were emitted from said engine, and entered said open spaces in said car, and ignited said hay and set the car on fire, and said animals were burned and damaged and killed, to the damage of the appellants in the sum of, etc.; wherefore, etc. There was an answer in denial, and the cause was tried by jury.

It appeared on the trial that the shipment was made under a written shipping contract, signed by both parties, which was introduced in evidence. It contained many provisions qualifying the liability of the carrier, among them a stipulation that the carrier should not be liable for any injury sustained by the live stock occasioned by certain specified causes, among them being the burning of hay or straw or other material used for feeding or bedding, or fire from any cause whatever. There was also a provision that no claim for damages which might accrue to the shipper under this contract should be allowed or paid by the carrier, or sued for in any court by the shipper, unless a claim for such loss or damages should be made in writing, verified by the affidavit of the shipper or his agent and delivered to the freight claim agent of the carrier at his office in Cincinnati,

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Ohio, within five days from the time of the removal of the stock from the car. There was a provision, also, that the shipper at his own risk and expense should load and take care of and feed and water the stock whilst being transported, and that the carrier should not be under any liability or duty with reference thereto except in actual transportation thereof; and provision was made for the carriage of those in charge of the stock without extra charge. There was an acknowledgment of the shippers that they had the option of shipping the stock at a high rate of freight according to the official tariffs, classifications, and rules of the carrier, and thereby receiving the security of the liability of the transportation company as a common carrier of said live stock, but that they had voluntarily decided to ship the stock under this contract at the reduced rate therein stipulated.

The court below ruled that, the action not having been brought upon the written contract, it could not be maintained, and directed the jury to return a verdict for the appellee, which accordingly was done. A motion for a new trial assigning the single ground that the court erred in thus instructing the jury was overruled, and the matter is brought before this court as a reserved question of law upon a bill of exceptions under §642 Burns 1894, §630 Horner 1897.

The complaint is characterized by the appellants as a complaint in tort. We think it can not properly be regarded as a complaint on contract express or implied. There is no averment of a promise and, in terms, a consideration therefor.

In *Smith v. Seward*, 3 Pa. St. 342, it was said: "There has been a good deal of wavering on the subject, not only as to the proper remedy, but as to the distinctive feature of the declaration. In regard to the latter, *Corbett v. Packington*, 6 Barn. & Cres. 268, has put the law of the subject on satisfactory ground, by making the presence or absence of an averment, not of promise only, but of consideration

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also, the criterion; * * * and when a consideration is not laid, the word *agreed*, or *undertook*, or even the more formal word promised, must be treated as no more than inducement to the duty imposed by the common law." See Hutchinson Carriers §744; *Ansell v. Waterhouse*, 2 Chit. 1; *Bretherton v. Wood*, 3 B. & B. 54; *Tattan v. Great Western R. Co.*, 2 E. & E. 844, 105 Eng. C. L. 844; *Baylis v. Lintott*, L. R. 8, C. P. 345.

In Elliott on Railroads, §1693, it is said: "As a general rule, where there is a breach both of contract and of duty imposed by law, as in the case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort. But it has been held in Indiana that where the plaintiff elects to sue in tort, or for a breach of the duty imposed by law, he can not recover if the evidence shows a special contract. This may be correct where the plaintiff sues on an implied contract, but where he sues in tort for negligence, it seems to us that it can not be good law, for it would do away with the doctrine of election of remedies."

If the complaint could be treated as based upon contract, it is well settled under our practice in this State that it could not be regarded as founded upon a written contract, and that in such case, when it appeared upon the trial that the contract was a written one, the action could not be further maintained.

In *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518, it was decided, that, under our code, where an action against a common carrier, as such, proceeds as upon contract, if the contract was in writing, the written contract, or a copy thereof, must be filed with the complaint, and that where in such case the contract is not by the complaint shown to be in writing and exhibited, and it appears in evidence on the trial to be a written contract, the plaintiff can not recover.

In *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339, the complaint alleged a special contract to transport certain live stock, from, etc. to, etc., at a specified price; that the

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plaintiff shipped the live stock described on the evening of a certain day, and the defendant agreed to deliver it at its destination the next day, at 9 o'clock, a. m., and the complaint showed negligent delay and consequent loss, etc. It was found on the trial that there was no special contract, and it was held by the Supreme Court that there could be no recovery on an implied contract to carry in a reasonable time, or for breach of the legal duty of the defendant as a common carrier; that there was a failure of proof.

In *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, it was said by the court (page 470) that, in both of the two paragraphs of the complaint, the plaintiff sued the defendant as a common carrier for hire for an alleged breach of its common law duty as such carrier in the transportation of his cattle. On page 469, speaking of the first paragraph of the complaint, it was said that in it the plaintiff "counted exclusively upon an implied contract or agreement of the appellant, as a common carrier, and sought to recover damages for an alleged breach of its common law duty as such carrier in the transportation of his cattle. No reference whatever is made in the first paragraph to any special or written contract between the parties for the carriage and delivery of appellee's cattle. When, therefore, the court found, as it did, that appellee's cattle were delivered to and received by the appellant under a special contract, which was at the time duly executed by the parties, it would seem that such finding would be an end of the case, as stated in the first paragraph of the complaint, and that no recovery could be had thereon. Especially so, when it was agreed in such special contract that the appellant 'does not and will not assume or consent, as a common carrier, to transport live stock.' In the face of this stipulation or limitation, agreed to expressly by the appellee, he can not, as it seems to us, maintain his action against the appellant, as a common carrier for any alleged breach of its common law duty as such carrier in the transportation of his cattle." On page

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471, after holding that the plaintiff by a reference in the complaint, which reference is quoted in the opinion of the court, did not in fact declare upon such contract, it was said: "It was not competent for the appellee, as it seems to us, to ignore the written contract assented to and accepted by him for the transportation of his cattle, and to attempt, in direct contravention of the provisions of such contract, to hold the appellant liable in damages as a common carrier, for an alleged breach of its common law duty as such carrier, in the transportation of his cattle." It will be observed upon a perusal of the original opinion in that case that the court held, in effect, that the special findings of the trial court showed that there was no negligence on the part of the carrier, and on petition for a rehearing it was said: "There can be no difference, practically, whether the appellee bases his claim for recovery upon the appellant's liability as a common carrier or upon the express contract set out in the special findings of the court, as, in our opinion, such special findings of fact show that the appellant was not liable upon either ground. The appellee's loss resulted from causes over which the appellant had no control, and against which no care or prudence could have provided; and the special findings show that the appellee's property had all the care and attention that, under the circumstances, an ordinarily careful man would have bestowed upon his own property."

In *Hall v. Pennsylvania Co.*, 90 Ind. 459, it was said that the complaint alleged, in substance, "that the appellee, on the 16th day of July, 1877, and long prior thereto, was a common carrier of goods, to carry for hire the goods of all persons, upon request, from Philadelphia, Pennsylvania, to Kendallville, Indiana; that on said day the appellant's testate [George Glatte], delivered to the appellee, as such carrier, in good order, fifteen barrels of sugar, the goods of such decedent, to be carried by the appellee safely from Philadelphia to Kendallville, then and there to be delivered

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to the said George Glatte, then in life; that appellee then and there received said goods to be safely carried and delivered as aforesaid, for a reasonable reward to be paid therefor by the said Glatte; that appellee failed and neglected safely to carry and deliver said goods to said Glatte, in his lifetime, nor since his death had appellee delivered the same to appellant, but that the same had been wholly lost, for want of due care and preservation by the appellee, to the damage of the appellant in the sum of," etc. It appeared in evidence that there was a written contract, which provided that the carrier should not be liable for loss by fire. It was said by the court that the appellant in the complaint "counted exclusively upon an implied contract or agreement of the appellee, as a common carrier, and sought to recover damages for an alleged breach of its common law duty as such carrier." The evidence showed that the goods were lost by fire, and clearly indicated that they were so lost without any negligence on the part of the carrier. The decision, however, was not based upon the absence of negligence, but it was said: "When the evidence showed, as it did, that the decedent's sugar was delivered to and received by the appellee for transportation and delivery, under the terms of a special contract, there could be no recovery by the appellant in this action, because the special contract was not sued on, and because of the fatal variance between the case made by the allegations of the complaint and the case made by the evidence."

The case last mentioned is recognized in *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, 328, as a suit on an implied contract.

In *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, an action for damages occasioned by delay in the shipment of live stock, it was said of the first paragraph of the complaint, that it was alleged that on, etc., the plaintiff delivered to the defendant, a common carrier, 265 head of hogs, at, etc., to be transported and delivered to the plaintiff at, etc.,

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within a reasonable time; that defendant failed to do this, but carried the hogs to an intermediate station named, and there delayed and kept them in pens, in unhealthy places, for twelve days, whereby fifty-eight died and the remainder shrank in weight, etc., to the plaintiff's damage, etc.

It was said by the court that this first paragraph of complaint was based on the defendant's liability as a common carrier, and not upon a written contract; but that it was shown in evidence, and specially found by the jury, that the shipment was made under written contracts; and thereupon it was said: "It is settled by the decisions of this court, that where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common law duty of such carrier, if the evidence shows that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal and the plaintiff cannot recover;" citing *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, and *Hall v. Pennsylvania Co.*, 90 Ind. 459.

In *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422, there were two paragraphs of complaint, and it was said by the court that both of them counted "upon the violation of an alleged agreement to ship from," etc., to etc., by a certain route named. It was said that the bill of lading must be taken as the final repository and the sole evidence of the agreement between the parties, and that *Indianapolis, etc., R. Co. v. Remmy*, *supra*; *Hall v. Pennsylvania Co.*, *supra*, and *Bartlett v. Pittsburgh, etc., R. Co.*, *supra*, maintain the rule that where suit is brought against a common carrier for a breach of common law duty, in failing to deliver the goods, if the evidence shows that the goods were received under a special written contract which was not declared on, the variance is fatal, and there can be no

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recovery; and that, since it appeared that the goods were received for shipment under a written contract set up in the first paragraph of complaint, "there could, in no event, have been a recovery under the second paragraph, which simply counted upon a breach of the carrier's common law duty."

In *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, it was said that the complaint declared upon a parol or implied agreement for the transportation of certain goods, for a valuable consideration, and charged that they were burned through negligence. On the trial, the evidence showed a bill of lading containing a stipulation against the carrier's liability for loss by fire. It was held that there was a fatal variance. In the course of the opinion it was said that if the evidence showed a case of negligence, the bill of lading would be no defense, "nor do we think in such a case it would necessarily constitute the foundation of the action." But it was further said, that if the liability were one from which the carrier might relieve himself by contract, and such contract was in fact entered into, "there can be no doubt under the Indiana authorities that the action must be upon the contract, and not upon the common law liability." The court spoke of the existence of a different rule elsewhere, and concluded that under the decisions of our Supreme Court the right to elect between an action in tort and an action on the contract does not in this State exist where there is a special contract. The decisions of the Supreme Court thus referred to have been noticed by us above.

In *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406, the complaint was treated as being "upon the common law liability." It was said: "It seems to be settled by the decisions in this State, that if the shipper declares upon an implied contract, or the common law liability, and it appears that the shipment was made in pursuance of a special contract or bill of lading, he must fail." In that case the first

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paragraph of complaint, as shown in the opinion of the court, was in tort, under the recognized rules of pleading, and the second paragraph perhaps might be properly classed as on contract. Again, in *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, it was said to be the established rule in this State that where the action is upon an implied contract or for an alleged breach of the carrier's common law duty, and it is found on the trial that the goods were shipped under a special written contract limiting the common law liability, the plaintiff can not recover, citing cases herein above noticed.

We have taken space to show the decisions to which the rule in question concerning pleading is referred. In some of them the action was plainly upon contract; in others, the views of the courts as to the character of the action are not clearly shown; but the rule as expressed embraces actions in tort, and some of the cases were in tort. Where there is no legal duty except that arising from a contract, there can not be an election between an action on contract and one in tort; for there is no tort. In such case there can be no action except upon the contract. All actions against common carriers for breach of their common law duty as such,—their supposed public duty implied by law,—wherein they were held to their common law liability, originally were in tort, being founded upon the custom; that is, upon the common law. Later they were held to the same responsibility in actions upon the contract, wherein, though negligence were alleged, the carrier could not exonerate himself by disproving negligence, but was held to answer for all loss, except such as happened through the act of God or the public enemy; and the carrier might be sued in assumpsit for breach of contract, or in tort for breach of duty. The existence of a contract does not divest the common carrier for hire of his responsibility as such in respect to any excepted cause of loss where, in fact, the loss was due to his negligence, the exception being understood to be conditioned upon due care on the part of the carrier.

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In Chit. Pl. 134, it is said that although assumpsit is the usual remedy for neglect or breach of duty against carriers, whose liability is founded on the common law as well as on contract, yet "they are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employ. * * * And it seems that although there be an express contract, still if a *common law duty* result from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract." As to the evidence, in either case, whether in tort or on contract, it is necessary to prove a contract implied or expressed. Angell on Carriers, §462.

In *Emigh v. Pittsburgh, etc., R. Co.*, 4 Biss. 114, an action for wrongfully putting the plaintiff off a train, where it was claimed that the second paragraph of the complaint was in assumpsit, it was said, per McDonald, J.: "As I understand it, the subjects proper for an action on the case are of two distinct classes. First, where there is a tort committed, without force, on the person, character, or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the *gravamen* of the action. * * * So this form of action lies against agents, wharfingers, and common carriers, whether they be acting under a contract expressed or implied. Indeed, nothing is more common in the common law courts than the action on the case against common carriers of goods, though their engagements are always on contract express or implied."

In 1 Chit. Pl. 384, it is said: "In an action on the case, founded on an express or implied contract, as against an attorney, agent, carrier, * * * for negligence, etc., the declaration must correctly state the contract, or the particular duty or consideration from which the liability results,

and on which it is founded; and a variance in the description of a contract, though in an action *ex delicto*, may be as fatal as in an action in form *ex contractu*." Again on p. 386, it is said to be a rule that, if a necessary inducement to the plaintiff's right, etc., even in actions for torts, relate to and describe and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract, it being matter of description.

In 2 Greenleaf Ev. §209, it is said that in any form of action the contract must be proved as laid in the declaration. Also in §210, it is said that if the defendant is proved to be a common carrier, where there is an express contract, that alone must be relied on, and no other can be implied.

In *Ansell v. Waterhouse*, 2 Chit. 1, it was said by Abbott, J.: "Plaintiff has his election, and may declare in either form, either for tort, or in assumpsit on the expressed or implied contract." That case was an action in tort. It was said that the terms of the contract, unless changing the duty of a common carrier, were in that case quite immaterial.

In *Legge v. Tucker*, 1 H. & N. 500, it was said: "Where the foundation of an action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty ultra the contract, the plaintiff may declare in case."

Walpole v. Bridges, 5 Blackf. 222, was in tort, on the case against a common carrier, founded on his general liability, for the non-delivery of goods. It was held that a bill of lading which did not restrict the general liability of the carrier was admissible in evidence for the plaintiff.

In *Ireland v. Johnson*, 1 Bing. N. C. 162, it was said that in an action of tort arising out of a contract the statement of the contract is often as material as in an action on the contract itself.

In *Lopes v. DeTastet*, 1 B. & B. 538, it was said by Dallas, C. J., that in actions of tort, wherever a party seeks to recover for a breach of duty growing out of an employ-

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ment, he must state the employment truly, and that in every case he is bound to prove the employment as he has alleged it. And by Park, J., it was said to be the rule that whether a party proceed in form *ex delicto* or in form *ex contractu*, yet the contract must be stated to raise the duty or employment. And by Burroughs, J., it was said that whether the action was in the shape of tort or assumpsit, the employment must be truly stated and proved.

In *Weall v. King*, 12 East. 452, an action on the case, it was said to be a rule of law that the proof of the contract must correspond with the description of it in all material respects.

In *Burnett v. Lynch*, 5 Barn. & Cres. 589, it was said by Bailey, J., on p. 605: "It is unnecessary to go through the cases in which it has been decided, that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty." And *Dickon v. Clifton*, 2 Wils. 319, was cited as a case where the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty.

In *Latham v. Rutley*, 3 D. & R. 211, the action being in assumpsit against common carriers, wherein the plaintiff merely declared against the defendants upon their common law liability, it was held that if there was a special agreement to deliver as directed, "fire and robbery excepted", and it was found by the jury that the loss was not occasioned by fire or robbery, but by the negligence of the defendant, the contract should have been declared upon specially, setting out the exceptions to the liability of the defendants, and that there was a fatal variance.

A common carrier, it has been said, does not by his special contract qualifying his common law liability, as such, become a private carrier as to the particular goods to which the contract relates, and where, in such a special contract, it

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is agreed that the carrier shall not be liable for losses occasioned by specified causes, as where it is so agreed as to losses by fire, proof of loss through negligence of the carrier will deprive him of the benefit of this exemption in the contract, and he will be held responsible to the same extent as if he had been a carrier not protected by a contract qualifying his liability. *Hutchinson Carriers*, §§42, 44, 119, 280.

In *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, 134, 17 L. R. A. 339, it is said: "The special contract, although it may release the carrier from some obligations and duties, does not take from him his character as a common carrier." See *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

Where live stock is shipped under an express contract which relieves the carrier from liability for loss occasioned by a specified cause, the carrier is not liable for loss occasioned by such cause if the carrier was itself without fault or negligence. *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281. Where the injury for which the plaintiff sues a common carrier is one arising from a cause as to which a special contract between the parties provides there shall be no liability of the carrier, as where the injury has been caused by fire, and by special contract it has been agreed that the carrier shall not be liable for loss from fire, as in the case before us, then the burden is upon the plaintiff to show the carrier's negligence. *Insurance Co. v. Lake Erie, etc., R. Co.*, 152 Ind. 333; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326; *Hutchinson Carriers*, §767.

If the carrier, however, were liable as for a breach of duty under the custom, he would be liable for all loss except such as was occasioned through the act of God or the public enemy, and the plaintiff, in such case, though he might allege negligence, would not be required to prove it. Neither would he be required to allege or prove want of contributory negligence on his part. *Evansville, etc., R. Co.*

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v. *Keith*, 8 Ind. App. 57. In the case of the shipment of live stock, the common carrier is, without special contract, exempt from liability for loss through the act of God or the public enemy, or through proper vice or inherent infirmity. Where, as here, there is a special contract for care of the stock on the part of the shipper during transportation, it has been held to be necessary for the plaintiff to take the burden of proving that the loss was not attributable to failure or negligence in the performance of his part of the contract. *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129. So where, as here, there is a special contract providing a necessity for reasonable notice of claim, the giving of such notice or the presentation of such claim being a condition precedent, it is a part of the plaintiff's cause of action to show performance of this precedent obligation on his part, or to show a waiver of performance or of strict formality. *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183; *Louisville, etc., R. Co. v. Widman*, 10 Ind. App. 92; *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47. If we could say that as to loss from an excepted cause, though occasioned by negligence, the carrier was not a common carrier, but was a private carrier, and that no common law duty had been violated, then it would seem to result that the action therefor must be in contract, and not in tort. We must be able to say that a common law duty has been violated to authorize an action in tort. But we apprehend that the fact that the loss has happened from an excepted cause, whether excepted by the common law or by contract, does not relieve the common carrier from liability as such, if in truth the loss was occasioned by his negligence, and in such case he has violated a duty imposed by the common law upon him as a common carrier.

Whatever may be the proper rule as to the burden of proof, a common carrier will not be relieved from liability

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for loss by the act of God or the public enemy, if his negligence concurred with such cause in producing the injury or contributed to the loss. *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564, 571. If he is actually guilty of negligence, he will be held liable for a loss which otherwise might be deemed a loss by an inevitable casualty. Story Bail., §492; Hutchinson Carriers, §§186, 208. In Hutchinson Carriers, §280, it is said: "Negligence and misfeasance universally deprive the carrier of all advantage which he might have otherwise derived, either from defenses based upon inevitable accident, the act of God, or contract, unless such contract cover his negligence; and even then it will not avail him unless, as we have seen by the law of the particular country, such exemption is considered just and reasonable."

It would be against public policy to permit common carriers, which are *quasi* public institutions and practically enjoy a monopoly (there being in truth a want of equality in the positions of the carrier and the shipper, respectively), to relieve themselves by contract entirely from their public duty. Therefore, if the contract except absolutely from the liability of the carrier losses from particular causes, still there will be a duty of the carrier not to permit such loss through the negligence of the carrier or its servants. If it be strictly true to say, as is sometimes said, that where there is a contract the general duty of the carrier in respect to which a tort may be committed is founded on contract, it must also be allowed that the law adds to the contract of a common carrier an implied warranty of exceptional stringency not applicable to the contracts of private carriers. The duty to exercise care and diligence is, in such case, in antagonism to the express terms of the contract; and whether it be said to be implied as a part of the contract, or that the contract should be construed as if the duty were expressly recognized therein, or it be said to be a duty *ultra* the contract, it is a duty imposed by law upon the common carrier as such,—it is a duty arising, by force of law, out

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of the unequal relation into which the parties have entered by contract. It is upon the theory that it is a private contract in which the public have no interest that the doctrine of the New York courts, repudiated by the Supreme Court of the United States, is based. *Parsons v. Monteath*, 13 Barb. 353; *Smith v. New York, etc., R. Co.*, 24 N. Y. 222; *New York, etc., R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

In the nature of things, under our system of law, the substantial distinction between actions sounding in tort and actions sounding in contract can not be abolished, and there has been no pretense that this distinction is abrogated or changed by our code. Where an action is spoken of as one for a breach of the common law duty of a common carrier, it is usually understood that an action of tort is meant. Possibly there may be in some of our cases expressions not required by the particular cases in hand. Under our code, it is only where an action is founded upon a written contract that it must be filed as an exhibit or set forth verbatim. A contract may be stated in a pleading, and though it be a material matter in the pleading, yet if the action is not on contract, but is in tort, there is no requirement that it be stated to be in writing, if this be true, or that, being in writing, it be set out verbatim. Yet it is the spirit of our system of code pleading which should be encouraged and maintained by the courts, that the pleadings should state the facts fully and plainly without fictitious inducements and as the facts constituting the cause of action will be relied upon or shown on the trial. When the cases in this State are considered with reference to the matters actually decided, possibly they are not necessarily inconsistent with the proposition that, in such a case as the one now at bar, there may be an election between an action on the contract, in which case it must be filed as an exhibit or set forth in its own terms, and an action in tort, in which case the contract should be so laid as matter of inducement that the pleading will truly show the respective rights and

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obligations of the parties; the plaintiff showing the breach of duty of the defendant, and a loss or injury as to which the contract would not afford protection to the carrier. The filing of the written contract with the complaint could not aid the pleading as an action in tort, and this characteristic of our code might possibly be made to serve in part as a mode of indicating the election of the plaintiff between tort and contract. The manner in which the relation between the parties originated, out of which arose the duty, should be shown in pleading, and the averments showing the relation can not be regarded as immaterial, but the facts should be proved as laid.

If there was in truth no contract except such as is designated as an implied contract growing out of or inferred from acts of parties, then there may be an action in tort without showing an express contract. But where there is in fact a special contract, whether oral or written, an action in tort is for a breach of duty in the course of an employment under an undertaking, and the contract by which the relation was entered into should be truly stated, and proof of a different express contract, or of an implied contract, should not be permitted to sustain such a cause of action. Whether or not such a method of pleading in tort, where the evidence will show a special contract, is permissible, it is manifest that the present action was not well maintained. In any view consistent with the decisions in this State, the proof of the special contract, in writing, under the issue formed by the complaint and answer, was enough to defeat the action.

Judgment affirmed.

THE COMMERCIAL TRAVELERS MUTUAL ACCIDENT
ASSOCIATION v. SPRINGSTEEN.

[No. 2,878. Filed January 11, 1900.]

ACCIDENT INSURANCE.—Notice of Injury.—Waiver.—Pleading.—An allegation in a complaint on an accident insurance policy that plaintiff gave defendant due notice of his injury at the home office of the company, "and that said notice was accepted by the defendant as sufficient notice, and without objection," is a sufficient averment of a waiver of a provision in the policy requiring a written notice to be given to the association at its home office within ten days after the injury. *pp. 658-660.*

SAME.—Interrogatories to Jury.—Answers to interrogatories, in an action on an accident insurance policy conditioned that it should not cover injuries from voluntary exposure to unnecessary danger, showing that plaintiff was injured by running into a wagon while riding a bicycle against a heavy wind, and that he could have avoided running into the wagon if he looked ahead, but that he was not conscious of existing danger when he received the injury, and that he did not knowingly and intentionally assume a risk, are not in conflict with a general verdict for plaintiff. *pp. 660, 661.*

SAME.—Notice.—Waiver.—Evidence.—Where a complaint, in an action on an accident insurance policy, sufficiently averred a waiver of a provision of the policy requiring a written notice of injury to be given to the secretary of the association at its home office, the testimony of plaintiff as to an alleged conversation had by him with the secretary wherein he gave defendant notice of his injuries was properly admitted in evidence. *pp. 661, 662.*

SAME.—Total Disability.—Instruction.—An accident insurance policy contained a provision that no claims should accrue under the contract unless the injury should, "independently of all other causes, immediately and wholly disable the insured from performing any and every kind of business pertaining to his occupation," etc. *Held*, that the court properly instructed the jury that plaintiff could recover if he was disabled to the extent that he could not do any and all kinds of business pertaining to his occupation. *pp. 662-672.*

SAME.—Voluntary Exposure.—Negligence.—The fact that plaintiff was guilty of negligence contributing to his injury will not defeat a recovery on an accident insurance policy conditioned that it should not cover injuries received from voluntary exposure to unnecessary danger, where the jury found that plaintiff had no knowledge of the danger. *pp. 672, 673.*

From the Marion Superior Court. *Affirmed.*

C. E. Barrett, for appellant.

J. W. Noel and *F. J. Lahr*, for appellee.

COMSTOCK, J.—This action was brought upon an insurance policy issued by the appellant, a mutual accident association organized under the laws of Indiana, to the appellee. The policy was issued November 1, 1895. Appellee received the injury for which he sues June 21, 1896, while the policy was still in force. The complaint was in four paragraphs. The first, third, and fourth paragraphs alleged that written notice of appellee's injury had been given to the association according to the terms of the policy. As it is not claimed that such written notice was ever given, these paragraphs are not discussed by appellant's counsel. In the second paragraph it is alleged "that the plaintiff immediately after said injury, to wit, on the —day of June, 1896, gave to the defendant at its home office in Indianapolis, Indiana, due notice, stating the name and address of the plaintiff, full particulars of the injury, and the name of the attending physician and an eye witness, and that said notice was accepted by the defendant as sufficient notice and without objection."

Appellant's demurrer to each paragraph of complaint was overruled. It answered in four paragraphs, the first a general denial; the second, pleading the failure of appellee to give the notice required by his policy; the third, pleading want of notice and certain other conditions of the policy; the fourth, pleading a voluntary exposure to unnecessary danger, and setting out the provisions of the policy in reference thereto. The cause was put at issue by a reply in general denial.

A trial by jury resulted in a general verdict in favor of appellee for \$250. With the general verdict, answers to interrogatories were returned. Judgment was rendered in favor of appellee for the amount of the verdict.

Appellant assigns as errors the action of the court in over-

ruling its demurrer to each paragraph of the complaint; (2) in overruling its motion "for judgment on the special findings of the jury"; (3) in overruling its motion for a new trial.

In discussing the second paragraph of the complaint, appellant's counsel refers to one of the provisions of the policy in suit, in the following language: "Notice of the injury shall be given, within ten days from the happening thereof and the notice of death within thirty days, in writing, to the secretary of the association at its home office in the city of Indianapolis, Indiana, giving the name and address of the member, the date and full particulars of injury or death, with the name of the attending physician and an eye witness; any failure to give such notice shall render void all claims for such injury or death under this certificate." It is argued that this paragraph attempts to set up a parol notice, and "does not plead any facts from which the court can legally determine that the appellant was notified according to the contract." Further, that the appellee could not plead a performance of the conditions of the policy and recover under proof of a waiver of performance; no waiver being pleaded. Without determining whether the facts pleaded notified appellant according to the terms of the contract, we are of the opinion that the language of Mitchell, J., speaking for the court, in *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, is a sufficient answer to the objections named. The language referred to is found on page 276 of the volume and is as follows: "Stipulations which do not properly amount to conditions upon which the inception or obligation of the contract depends, and which merely require that something should be done by the assured in the way of furnishing proofs or information to the insurer regarding the circumstances and origin of the fire, the nature and extent of the loss, may be and are waived when other proofs or information in respect to the same matter are accepted or received without objection by an agent

of the company who is duly authorized to act with reference to that subject. *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; May Insurance, §511." This is not a question of the authority of an agent to waive the conditions of a policy. The paragraph alleges that he gave "due notice" stating full particulars of his injury to the defendant at its home office in Indianapolis, and that the notice was accepted by the defendant as sufficient notice, and without objection. See, also, *Aetna Ins. Co. v. Shryer*, 85 Ind. 362. The company had the right to accept any information upon the subject as sufficient. It is sufficient to plead facts constituting a waiver without in terms averring that the conditions were waived. The word "due" used in connection with the word notice, neither strengthens nor weakens the other averments of this paragraph. The allegation that the information was accepted as sufficient made the notice sufficient. The court did not err in overruling the demurrer to this paragraph.

Appellant next contends that the court erred in overruling its motion for judgment on the answers to interrogatories. In the fourth paragraph of the answer, it is averred that appellee voluntarily exposed himself to unnecessary danger, and that his injury was occasioned by reason of such voluntary exposure. The condition of the policy upon which this clause is based is as follows: "This certificate of insurance does not cover injuries nor death from any of the following causes: * * * voluntary exposure to unnecessary danger." The fourteenth interrogatory and answer thereto is as follows: "Was Robert E. Springsteen when injured voluntarily riding a bicycle against a heavy wind, and, at the time he received his injuries, not looking ahead to see where he was going? Answer. Yes." Interrogatory twenty-two is as follows: "Had Robert E. Springsteen been looking where he was going at the time he received his injuries would he not have discovered the wagon into which he ran in ample time to have turned out and avoided

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it? Ans. Yes." The jury in answer to other interrogatories found that the plaintiff was not conscious of existing danger when he received the injury; that he did not knowingly and intentionally assume a risk; that he did not intentionally take chances of colliding with the wagon, knowing of its presence; and that, in riding as stated in answer to interrogatory fourteen, he did not voluntarily expose himself to unnecessary danger, and in consequence thereof received the injury of which he complains; that the injury occurred when he was riding on a public highway on Sunday, June 21, 1896. The interrogatories and answers thereto do not constitute a special verdict. At the date of the trial, November 8, 1897, there was no statute in force in this State authorizing a special verdict. Interrogatories will not control a general verdict unless they are in irreconcilable conflict with it. *Sponhaur v. Malloy*, 21 Ind. App. 287.

In *City of Ft. Wayne v. Patterson*, 3 Ind. App. 34, the rule is thus stated: "If, taking all the special findings together, and adding to them any other fact that might have been proved under the issues, an irreconcilable conflict with the general verdict can be avoided, the answers to interrogatories will not be allowed to control." There is no irreconcilable conflict in the facts found and the general verdict, and the court did not err in overruling appellant's motion for judgment.

Under the third specification of the assignment of errors counsel for appellant first discusses the twelfth reason set out in the motion for a new trial, viz.: That "the court erred in admitting in evidence the testimony of the plaintiff as to a conversation had with one Benjamin H. Prather, wherein it was claimed that the plaintiff gave defendant notice by parol of his alleged injuries." Prather was the secretary of the defendant company. Appellant's proposition is that a written notice of the injury being provided for in the policy, proof of said notice was incompetent. The second paragraph of the complaint sufficiently averred a

waiver of this provision; parol proof was therefore admissible.

Counsel for appellant insists, under proper assignments in the motion for a new trial, that the court erred in giving of its own motion certain instructions to the jury, and in refusing to give certain instructions requested by appellant. The seventh instruction given by the court undertakes to define total disability. The appellant in effect requested the court to instruct the jury that in order to recover, appellee's injury must have been such as wholly to disable him from performing any and every kind of business pertaining to his occupation as manager of the When Clothing Store. The court refused this instruction, and instructed that appellee could recover if he was disabled to the extent that he could not do any and all kinds of business pertaining to his occupation. Appellee's occupation, in the policy, was described as manager of the When Clothing Store. The condition of the policy in question is as follows: "No claims of any character shall accrue upon this contract unless it arises from physical bodily injury, through external, violent and accidental means, while this contract is in force, and then only when the injury shall, independently of all other causes, immediately and wholly disable the insured from performing any and every kind of business pertaining to his occupation as above stated." The expressions of the courts as to what constitutes total disability are not in harmony.

In *Ford v. United States, etc., Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700, the insured was described in the policy as having a twofold occupation, that of leather cutter and merchant. The court held that in order to recover a weekly indemnity, he must be wholly disabled from the prosecution of any and every kind of business pertaining to the occupation under which he was insured, that is, the twofold occupation of leather cutter and merchant. The policy among other things provided that "if the insured shall sustain bodily injuries * * * which

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shall * * * immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured", then he is to be indemnified in the sum of \$15 per week.

In *Hutchinson v. Supreme Tent, etc.*, 68 Hun 355, 22 N. Y. Supp. 801, the constitution of the society in which the plaintiff held a certificate of membership provided that: "A total and permanent disability to perform or direct any kind of labor or business, or upon reaching the age of seventy years, shall entitle a member holding a certificate of endowment, so disabled or aged, to the payment of one-half of the endowment to which he would be entitled at death." The court said: "Here we have a definition or a description of the disability that would entitle the plaintiff to recover. It is not only permanent, but total, so as to be unable to perform or direct any kind of labor or business. It is not limited to the business in which the plaintiff was engaged at the time of his injury, but it is in the broadest language possible to use, a total and permanent disability 'to perform or direct any kind of labor or business.' A total disability is ordinarily one of fact, and is for the jury. It must be determined from the facts and circumstances disclosed in each case. That which would be total disability in one case might not be in another. The loss of a hand by a lawyer might interfere but slightly in the transaction of his business, or in the performance of his work. Whilst to a man who had learned a particular trade, by which he had always earned his living, and was entirely ignorant of all other trades or business, it might prove to be a much more serious disability. Ordinarily, the loss of the fingers of the hand does not constitute total disability from the performance of any kind of labor or business."

In *Neill v. Order of United Friends*, 28 N. Y. Supp. 928, it was held that under a policy of a benefit society providing that, should a member become permanently dis-

abled from following his usual, or some other occupation, he should be entitled to one-half the amount of the certificate. A member who is disabled from following his usual employment is entitled to such provision of the benefit, though he is not disabled from following some other occupation. The court said: "In construing such a provision in a contract such as the one under consideration, the court will give it such meaning as will be consistent with the fair import of the words used, having reference to the purpose and object of the parties in entering into the agreement, and, as the language is that of the defendant, a construction will not be adopted which will defeat a recovery, if it is susceptible of a meaning which will permit one."

Lyon v. Railway, etc., Co., 46 Iowa 631, was a suit upon an accident policy in which it was stipulated that the company would indemnify the assured for loss of time while totally disabled. He can not recover except upon proof of total disability. The trial court gave the following instructions: "(4.) The policy provides that the defendant will be entitled to recover for injuries resulting from accidents only while the insured was totally disabled, and prevented from the transaction of all kinds of business. But this language must be construed in a practical sense, and means inability to follow any occupation, business or pursuit in the usual way. Though he may have been able to do some parts of the accustomed work thereof, he may yet recover so long as he cannot to some extent do all parts, and engage in all such employments. The fact that he may do some light parts of the work, when he cannot engage in the work itself, to any practical extent, will not prevent a recovery. (5.) The words 'all kinds of business' should receive a practical construction, and with reference to the party insured, and, if he was qualified to engage in any business which he could do under the injury, then it would be his duty under the contract so to do; but the fact that there may be some business or occupation in which he could engage, would not

prevent a recovery unless it was an occupation or business which he was qualified to engage in as an occupation, and transact in the usual way." The Supreme Court said: "These instructions are, it seems to us, clearly erroneous. The parties must be bound by the terms of their contract. The contract of insurance provides that the defendant will indemnify the assured against loss of time while totally disabled and prevented from the transaction of all kinds of business, solely by reason of bodily injuries effected through outward and accidental violence. The fourth instruction construes the contract to mean something entirely different. The jury are directed that plaintiff may recover though he may be able to do some parts of the accustomed work pertaining to his business, so long as he cannot, to some extent, do all parts and engage in all the employments thereof. Almost total soundness and ability, instead of total disability, is made the condition of plaintiff's right to recover, and of defendant's liability. * * * This is not the proper construction of the agreement. It interpolates into it terms and conditions upon which the parties never agreed, and attaches to the words employed a meaning of which they are not susceptible."

In *Saveland v. Fidelity, etc., Co.*, 67 Wis. 174, 30 N. W. 237, the plaintiff who sued upon a policy insuring against accidents was by occupation a merchant. The policy provided for indemnity for injuries which should totally disable him from prosecuting any and every kind of business pertaining to his occupation for such period of continuance, the total disability not exceeding the amount stipulated nor the money value of his time during the period of continuance of total disability, not exceeding twenty-six weeks. The complaint alleged that while the plaintiff was employed in his regular business, and his earnings at the time were \$100 per week, he was accidentally hit with great force by a stick of wood thrown by some party, inflicting the injury for which he sued, and was thereby wholly disabled and unable

to engage in any business for the first week thereafter and was during that time confined to his room and under the doctor's charge; that afterwards, by means of great exertion he was enabled to get into his buggy and superintend a small part of his business, but was practically disabled for a total period of twenty-six weeks. The court held that it was error to instruct the jury that the defendant was to pay the amount agreed if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged and that he was entitled to recover for such time as he was rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent. The court said that this instruction enlarged the risk of the company; that the plaintiff's right to recover was necessarily restricted to the time he was wholly disabled, and prevented from the prosecution of any and every kind of business pertaining to his occupation.

In *Knapp v. Accident Assn.*, 53 Hun 84, 6 N. Y. Supp. 57, the policy was against injuries by means of which the insured should be immediately and wholly disabled, and prevented from the prosecution of any and every kind of business pertaining to the occupation in which he received membership. The insured was described in the policy as retired. He testified at the time he made his application for insurance that he had no occupation except to amuse himself; that his income was derived from investments; that he had a shop at his house where he spent his leisure moments; that he was a stockholder and director of a wagon manufacturing company, and at times used some of the machinery of the wagon shops in connection with his amusement. In operating a buzz saw at the wagon shop, he received the injury for which he sought to recover indemnity. The wound was severe and painful; the hand was required to be carried in a sling; plaintiff was deprived of its use to a greater or less extent during the period of some

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months. The court held that the injuries must be such as wholly to disable and prevent him from prosecuting any and every kind of business pertaining to his occupation, and that he was not totally disabled and prevented from prosecuting any and every kind of business pertaining to his occupation; that he might keep an eye upon his investments, collect or reinvest his income; that he was able to superintend repairs, etc., to his property generally, devote considerable attention to his family and estate.

In *Turner v. Fidelity, etc., Co.*, 112 Mich. 425, 70 N. W. 898, the policy provided for the payment of indemnity for injuries which should wholly disable the insured from prosecuting any and every kind of business pertaining to his occupation. The court held that the insured could recover on proof that he was in the real estate business and that he went to his office every day for a short time but was unable to do any kind of work. In the opinion, the court said: "At least, it was a question for the jury to determine, and the court submitted it in these words: 'I think that a fair interpretation of that clause is, not that he must be so disabled as to prevent him from doing anything pertaining to the business, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to his occupation; not that he might do some one thing in regard to it, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to that occupation. I submit that to you as a question of fact to find whether he was so disabled, and for what length of time, under this policy.' "

In *Lobdill v. Laboring Men's, etc., Assn.*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, the court said: "There are a few propositions applicable to the construction of the policy under consideration, which, under the evidence are decisive of this case. The first is that total disability does not mean absolute physical inability on part of the insured to transact any kind of business pertaining to his occupation.

It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself. *Young v. Travelers Ins. Co.*, 80 Me. 244, 13 Atl. 896. The second is that under the particular terms of this policy, to wit, 'from transacting any and every kind of business pertaining to the occupation above stated' (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. For example, the occupation of a retail country merchant (as plaintiff was) embraces various departments or kinds of business, such as keeping the books, making out accounts and settling with customers; waiting on customers, and doing up their purchases in packages; also the handling and arranging of goods in the store. If an injury disabled the insured merchant from transacting one or more of these branches of the business, but left him able to transact others with due regard to his health, he would not be totally disabled within the meaning of this policy. But the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable, substantially or to some material extent, to transact any kind of business pertaining to such occupation."

In *Young v. Travelers Ins. Co.*, 80 Me. 244, the policy provided that if the insured shall sustain bodily injuries, which shall wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, certain indemnity should be paid him. The court held that in order to entitle the insured to recover that indemnity, he was not required to prove that his injury disabled him to such an extent that

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he had no physical ability to do anything in the prosecution of his business, but that it was sufficient if he satisfied the jury that his injury was of such character and to such an extent that he was not able to do all the substantial acts necessary to be done in the prosecution of his business.

In *Wolcott v. United, etc., Assn.*, 8 N. Y. Supp. 263, in an action on a policy providing indemnity during total disability, a physician holding the policy was held to be entitled to pay for time when he was confined to his bed by an accident, though during that time he gave occasional examinations, and prescribed for patients who came to his bed-side, and reached for medicines for them without leaving his bed. The court said: "Total disability must, of the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how a person who labors with his hands would be totally disabled only when he cannot labor at all. But the same rule would not apply to the case of a professional man, whose duties require the activity of the brain, and which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go about his business, enter his office, and make calls upon any of his patients, but is confined to the bed, as in this instance, and enabled only to exercise his mind on occasional applications to him for advice, he may be said to be totally disabled, within the meaning of the provisions of this policy."

In *Hohn v. Inter-State Casualty Co.*, 115 Mich. 79, 72 N. W. 1105, the policy contained this provision: "If such injuries, * * * wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay" etc. The insured, a barber, after receiving the injury on account of which he sued, went to his shop and attempted to do some work, but he suffered such pain that he fainted away and was sent home in a hack. During the week he was some

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better and visited his shop, but was suffering pain all the time, worked a little, but was unable to perform all of his duties because of pain, and after that he was compelled to remain in bed for some time. The court held that he was totally disabled within the meaning of the policy; the court citing in the opinion, *Young v. Travelers Ins. Co., supra*; *Lobdill v. Laboring Mens, etc., Assn., supra*; *Turner v. Casualty Co., supra*.

Bliss on Life Insurance, at page 723, §403, cited by appellant, gives the interpretation of numerous decisions as to what is being disabled from usual employment without discussing them.

May on Insurance, §522, cited by appellant, says, citing *Hooper v. Accident, etc., Assn., 5 Ill. & N. 546*, that "wholly disabled" is equivalent to "quite disabled" and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as to do any part of his business, though the insured "may do certain parts of his accustomed work, and engage in some of his usual employments, he may yet recover, so long as he cannot to some extent do all parts, and engage in all such employments," citing several cases in support of said proposition.

Joyce on Insurance, at §3031, in referring to certain cases most of which are hereinbefore set out, says: "Some of the cases are certainly open to criticism, in that the object and purposes of the insurance contract are ignored and the rules of construction strained. The general purpose of such clauses is to furnish an indemnity to assured for the loss of time by reason of accident or injury which prevents him from prosecuting his business, and it would seem that this ought to refer to his inability to perform substantially the duties which are necessary to be done in the business to which the contract refers, an absolute physical inability ought not to be meant in all cases, for the injury might be of such a character as that common care and prudence would preclude the prosecution of said business."

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Upon the clause of the policy in question, the court in the cause before us instructed the jury as follows: “(7) This paragraph sets out as an exhibit a copy of the policy, and in said policy it is provided that no claim shall ever accrue unless it arises from physical bodily injury through external, violent, and accidental means, and then only when the injury shall, independently of all other causes, immediately and wholly disable the insured from performing any and every kind of business pertaining to his occupation as manager of the When Clothing Company. I instruct you that as a matter of law the meaning of this provision of the policy is not that the plaintiff must have been disabled so as to prevent him from doing anything whatsoever pertaining to his said occupation, but that he must have been disabled only to the extent that he could not do any and every kind of business pertaining to his said occupation. He might be able to do a part and not be able to do all, and because he was not able to do all be deemed to be wholly disabled from doing any and every kind, provided, of course, that he was so disabled as to be prevented from doing substantially all the necessary and material things in said occupation requiring his own exertions in substantially his customary and usual manner of so doing. He might be able to do personally minor and trivial things, not requiring much time or physical labor, and through others, acting under his direction, to do the heavier things requiring physical exertion, which in the ordinary and proper performance of his duties he had heretofore done personally, and yet because of inability to do these heavier things and more material things personally, be said to be wholly disabled within the terms of his policy; provided, further, that the things he was unable to personally do constitute substantially all of his said occupation.”

We make no attempt to harmonize the decisions cited. But in view of the liberal rule of construction, which holds that, where the language used in a policy of insurance is capable of two constructions, the one most favorable to

the assured must be given,—which rule has been adopted in this State,—the instruction fairly stated the law as announced by the weight of authority. *Indiana, etc., Ins. Co. v. Rundell*, 7 Ind. App. 426; *Supreme Lodge v. Edwards*, 15 Ind. App. 524; *Globe Ins. Co. v. Helwig*, 13 Ind. App. 539; *Bank v. Insurance Co.*, 95 U. S. 673.

We have read the instructions requested by appellant and refused by the court. So far as they state the law, they were substantially covered by those given. The question of whether appellee voluntarily exposed himself to unnecessary danger was properly submitted under an aptly worded instruction to the jury, as was the question whether appellee gave a notice of his injury to the company which was accepted and acted upon by it. The evidence shows that the claim of appellee was not rejected for want of notice, but upon the ground that his disability was not total within the meaning of the policy.

That appellee was guilty of negligence contributing to his injury, there can be no question, but the jury found that he had not knowledge of the danger. This court, in *Conboy v. Railway, etc., Assn.*, 17 Ind. App. 62, by Black, J., said: "Giving the words definitions, and the language a meaning most unfavorable to the insurer and most favorable to the insured, the exception may be construed as contemplating knowledge on the part of the insured of the existence of the danger or peril, and an encountering of it by him willingly. We think that the facts alleged do not show that the death of the insured was within the exception. They indicate an accidental death from a suddenly encountered danger. It is not shown that the insured consciously and intentionally exposed himself to danger, or that he presumed or dared to run a risk of peril. It does not follow because an act was voluntary, that the exposure was voluntary." And in *Keene v. Accident Assn.*, 161 Mass. 149, 36 N. E. 891, 892, it was said: "A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. The policy recognizes that

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there are some dangers which it is necessary to encounter, as, for example, where there is a chance to rescue persons in deadly peril. See *Tucker v. Mutual Benefit Co.*, 50 Hun 50, 4 N. Y. Supp. 505. There are other dangers which one usually need not encounter if he knows of their existence long enough beforehand, as, for example, the danger from a runaway horse or a coming car; and a merely inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious intentional exposure; something which one is consciously willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence."

We have carefully examined the record, passed upon the controlling questions presented, and find no error for which the judgment should be reversed.

Judgment affirmed.

JENNINGS ET AL v. DURFLINGER.

[No. 2,981. Filed January 12, 1900.]

ACCORD AND SATISFACTION.—*Payment.—Acceptance of Check.*—Plaintiff sold defendant a certain number of hoops of a certain quality, at an agreed price per thousand, to be delivered at the expense of plaintiff. Defendant sent plaintiff a check by mail for a less sum than was due, containing the statement "to be accepted in full of account." Plaintiff indorsed the check as credited to the account of defendant, negotiated same, and immediately notified defendant that a certain balance was still due. *Held*, that the acceptance of the check did not amount to an accord and satisfaction.

From the Henry Circuit Court. *Affirmed.*

Eugene H. Bundy and *John M. Morris*, for appellants.
M. E. Forkner and *W. E. Jeffreys*, for appellee.

HENLEY, J.—This action was commenced by appellee against appellants by a complaint in one paragraph, being

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a common count for goods sold. Appellants answered in four paragraphs. The cause was submitted to the court for trial without the intervention of a jury, and the court, by request of plaintiff, made a special finding of facts, and stated its conclusions of law thereon. The only question in this case is whether or not the special finding of facts does or does not show an accord and satisfaction of the claim sued on.

The special finding of facts, which presents the whole question in this case, is as follows: "That, on the 19th day of February, 1897, the defendants were engaged as partners and dealers in and in the manufacture of coil hoops for the purpose of making coil hoops for barrels; that they conducted their business under the style and the name of the Newcastle Coil Hoop Company. That on said day the plaintiff, John W. Durflinger, was engaged in a like business in the town of Noblesville, Indiana, in the name and under the style of the Noblesville Coil Hoop Company. That on said date defendants purchased of the plaintiff, by written correspondence, one carload of 6-9 hoops, to be furnished and delivered to them on board the cars at the city of Chicago, Illinois, to be again sold by them to dealers in that city or elsewhere; that by the terms of said contract said hoops were to be of good quality number one 6-9 hoops, for which the defendants were to pay the plaintiff \$5.70 per thousand, delivered free on board the cars at Chicago, Illinois. I further find that thereafter, under and pursuant to said contract of sale, the plaintiff placed in a car at said Noblesville, Indiana, 54,590 number one 6-9 hoops of good quality, and by direction of the defendants consigned said car to H. E. Jennings, one of the defendants, at Chicago, Illinois; that in due course of time said carload of hoops arrived at the said city of Chicago, and that the freight charges thereon were \$32.65, which amount was paid by the defendants. I further find that, after said carload of hoops had arrived at Chicago, the said Harry E. Jennings made an examination of the same, and claimed to discover

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that said hoops were not of good quality number one 6-9, but he claimed that the same were defective in workmanship and quality of material, that they were not of uniform size, either in thickness, width, or length, and that the same were not on that account merchantable; that, immediately after such examination, the said H. E. Jennings notified the plaintiff by telegram, which notice was received by plaintiff, of the alleged defective and inferior quality of said hoops, and that he could not receive and accept the same at a greater price than \$4.35 per thousand; that to this notice plaintiff made no reply. That thereafter on the — day of — the said H. E. Jennings again notified the plaintiff of the alleged defective condition and quality of said hoops, and that he was not willing to accept them at the price; that this second notice was received by the plaintiff, and that he made no reply thereto. I further find that after the two notices were sent to plaintiff, as before stated in this finding, the defendant, H. E. Jennings, took and sold said hoops in said city of Chicago, Illinois, and that he received for the same the sum of \$4.35 per thousand, and that he notified the plaintiff of such sale and the price received. I further find that on the 15th day of March, 1897, the said Harry E. Jennings, for and on behalf of the defendants, and in the firm name of the Newcastle Coil Hoop Company, sent to the plaintiff the following statement:

'Newcastle, Indiana, March 15, 1897.

The Noblesville Coil Hoop Company, Noblesville, Indiana. To the Newcastle Coil Hoop Co., Dr.

54,420 Hoops, \$4.35.....	\$236.72
Frt. & demurrage.....	\$39.65
Commission on car.....	10.00
Telegram65
Telegram50
One, per cent. cash.....	2.36
March 15th, check bal. acct....	183.56
	<hr/>
	\$236.72 \$236.72'

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And with said statement said defendant sent a check upon the Citizens State Bank of Newcastle, Indiana, in these words: 'No. 2,616. Newcastle, Indiana, March 15, 1897. Pay to the order of Noblesville Coil Hoop Company, \$183.56 to be accepted in full of account. The Newcastle Coil Hoop Company, by H. E. Jennings.' That said statement and check were inclosed with a letter in these words, to wit: 'Newcastle, Indiana, March 15, 1897. The Noblesville Coil Hoop Company, Noblesville, Indiana. Gentlemen: We received check for the car hoops this a. m. The bill for demurrage we have not received,—or I suppose it is demurrage, as they deducted \$39.65. Will write our party in regard to this and advise you later. We have charged you \$10 commission, you see. This will not more than cover the writer's expense in selling the car. I spent about a day and a half trying to dispose of the car, so you see \$10 will not cover the expense. We would advise you to put in your mill a man who is a practical hoop man, and thus do away with all your trouble and expense. Yours truly, The Newcastle Coil Hoop Company, by H. E. Jennings.' That, immediately upon the receipt of said letter with said statement and check, the plaintiff, to wit, on the 16th day of March, 1897, indorsed said check as follows: 'March 16, '97. Credited to the account of the Newcastle Coil Hoop Company, per John W. Durlinger, Prop.', and negotiated said check to the First National Bank of Noblesville, Indiana. That immediately on receiving said check, to wit, on the 16th day of March, 1897, the plaintiff wrote to the defendants the following letter: 'Noblesville, Indiana, March 16, 1897. Mr. H. E. Jennings, Newcastle, Indiana. In reply to yours of March 15th, I have your letter containing check for \$183.56, and freight bill for \$32.65, which I have placed to your credit. Your balance is \$95.69, for which I will make a draft on March 22nd, and, should you not pay, I will place same in hands of an attorney for collection. Respectfully, Noblesville Coil Hoop Company,

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by John W. Durflinger.' That said plaintiff enclosed said letter in an envelope, and deposited the same in the United States mail, postage prepaid, directed to the defendants, and that in due course of mail, on the 17th day of March, 1897, the defendants received said letter. I further find that said check was indorsed by the First National Bank of Noblesville, Indiana, to Indiana National Bank of Indianapolis, and by it indorsed to the First National Bank of Newcastle, Indiana, and was paid by the Citizens State Bank of Newcastle, Indiana."

Upon the foregoing facts, the court found "that the law is with the plaintiff, and that there is a balance due him, after deducting the amount of said check and freight charges paid by the defendant, of \$94.56. I therefore find for the plaintiff, and assess his damages at \$94.56."

The question of whether or not the special finding shows an accord and satisfaction is wholly dependent upon whether or not the facts so found make the claim one for an ascertained sum, a liquidated amount.

Appellants purchased of appellee a certain number of hoops of a certain quality at an agreed price per thousand. The hoops were to be delivered on board cars at Chicago. This meant that freights were to be paid by the consignee, and deducted from the amount due upon the hoops. The facts found show that the number, kind, and quality of hoops ordered by appellants were delivered to appellants by appellee at Chicago. The deduction for freight charges, and computing the amount due for the hoops at the agreed price per thousand, was a mathematical calculation, from which the same result must invariably follow.

It is the settled rule of law in this State, deducible from the decisions in both courts of appeal, that a simple payment and acceptance of a less sum of money in satisfaction of a greater liquidated sum due, will not be sufficient to sustain a plea of accord and satisfaction. To make the receipt of a part of a debt a discharge of the whole, there must be a

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new consideration, or a voluntary compromise of a disputed and disputable demand, or an accord and satisfaction by the substitution of a new contract, or a submission of the matters in dispute to arbitration. *Ogborn v. Hoffman*, 52 Ind. 439; *Longworth v. Higham*, 89 Ind. 352; *Stone v. Lewman*, 28 Ind. 97; *Hancock v. Yaden*, 121 Ind. 366; *Henes v. Henes*, 5 Ind. App. 100; *Meyer v. Green*, 21 Ind. App. 138; *Pottlitzer v. Wesson*, 8 Ind. App. 472; *Hodges v. Truax*, 19 Ind. App. 651. The case of *Meyer v. Green*, *supra*, is very much like the case at bar. This court in the last mentioned case held "that where a debtor sent to his creditor a check for a part of a liquidated sum due the creditor, reciting in the check that it was in full of all demands, that the acceptance of the check by the creditor did not discharge the entire debt."

Under the law, as established in this State, we are of the opinion that the conclusions of law upon the facts found are correct. Judgment affirmed.

LAKE ERIE AND WESTERN RAILROAD COMPANY v.
GRAVER.

[No. 2,978. Filed January 12, 1900.]

VERDICT.—*Special Finding.—Conflict.*—The general verdict must stand as against the facts specially found, unless such facts are in irreconcilable conflict with the general verdict. p. 683.

NEGLIGENCE.—*Railroads.—Statutory Signals.*—Answers to interrogatories in an action for an injury at a railroad and highway crossing by which the jury found that the bell upon the locomotive was not rung continuously from a point not less than eighty nor more than one hundred rods from the crossing until such engine had fully passed the crossing, shows negligence *per se* on the part of the railroad company. p. 684.

VERDICT.—*Special Finding.—Conflict.*—Where the jury in answer to an interrogatory in an action against a railroad company for an injury at a railroad and highway crossing stated that the failure of defendant to sound the whistle and ring the bell might have been the proximate cause of the plaintiff's injury, and in answer to

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other interrogatories found that defendant did sound the whistle, such findings do not establish the fact that the failure to ring the bell was the proximate cause of the injury, but leave the fact established by the general verdict that such failure was the proximate cause of the injury unimpeached. p. 684.

NEGLIGENCE.—*Railroads.—Injury at Crossing.—Interrogatories to Jury.—Conflict with General Verdict.*—Answers to interrogatories in an action by plaintiff for injuries received at a railroad and highway crossing by being struck by a train, to the effect that plaintiff was approaching the crossing, which he knew to be extraordinarily dangerous, traveling in a farm wagon, and at several points from about 800 feet from the crossing he could have seen the track and approaching train, which he knew was about due, by looking through between rows of trees in an orchard; that when he got within thirty-five feet of the crossing he could have had an unobstructed view of the track for 800 feet in the direction of the approaching train, and could have heard the noise of the approaching train, show plaintiff to have been guilty of contributory negligence, and are in irreconcilable conflict with a general verdict for plaintiff. pp. 684-690.

From the Henry Circuit Court. *Reversed.*

John B. Cockrum, John L. Rupe, E. H. Bundy, W. E. Hackedorn and W. A. Brown, for appellant.

Thomas J. Study, for appellee.

WILEY, C. J.—Appellee sued appellant to recover damages for injuries received by being struck by appellant's train while crossing a public highway. The complaint is in one paragraph, and it is shown that the injury occurred a little more than half a mile north of Dublin, in Wayne county, Indiana. The acts of negligence charged are that the train was running at a high and dangerous rate of speed; that the servants in charge of the train failed to sound the whistle not less than eighty nor more than 100 rods from the crossing, and failed to ring the bell continuously until the crossing was reached. The complaint avers that appellee was without fault. A demurrer to the complaint was overruled, and the issue was joined by an answer in denial. A trial by jury resulted in a general verdict for appellee. With the general verdict the jury found

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especially as to certain facts, by answers to interrogatories. Appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict, was overruled. The overruling of the demurrer to the complaint, and the motion for judgment, are assigned as errors.

As we believe that the rights of the parties must be determined by the facts specially found, we do not deem it necessary to consider the question of the sufficiency of the complaint. The facts specially found by the answers to interrogatories, in so far as their controlling influence is concerned upon the motion for judgment, are as follows: The highway upon which appellee was traveling runs north and south. Appellant's railroad, where it intersects the highway, runs in a northwestern and southeastern direction, and the two intersect at an angle of about forty-five degrees. At a point in the highway, 105 feet south of the center of the crossing, appellee could not see appellant's track at a greater distance than 166 feet south of the crossing. At a point in the highway thirty-five feet south of the crossing, appellee could not see the track, nor a train thereon, at a greater distance than 300 feet. Appellee, and one Hudelson, who was with him in the wagon, did not look and listen for the train as they passed the line between the house and orchard, about 300 feet south of the crossing. They began to look and listen about half way down the orchard, and continued until the train appeared from behind the obstructions. When they did see it, it was so close to them that appellee could not extricate himself, team, and wagon from the danger of collision, or prevent it. Appellee's view of the railroad and the approaching train was almost obscured from a point where he came on the highway, to a point within 105 feet of the crossing by apple and other trees, farmhouses, buildings, and fences, except when looking between the rows of trees; appellee's view of the railroad, at a point 105 feet south of the crossing, was obscured by apple trees on the north line of the orchard from a point 166 feet south of the cross-

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ing. The view of the railroad extended south as appellee proceeded, not exceeding 300 feet, at a distance thirty-five feet south of the crossing. The servants in charge of appellant's train sounded the whistle at a point not less than eighty nor more than 100 rods south of the crossing, but did not ring the bell continuously; if the bell had been rung, appellee could have heard it; the failure to ring the bell continuously from a point not less than eighty nor more than 100 rods, as the train approached the crossing, might have been the proximate cause of appellee's injury. The appellee did not hear or see the train in time to have avoided the injury by the exercise of reasonable care and diligence. At the time of the accident appellee was well acquainted and entirely familiar with the country and place where the injury occurred, and was acquainted with all the surroundings. At the time of the accident, appellee was in full possession of all his faculties, and his sight and hearing were unimpaired. Appellee entered the highway through a gate about 500 feet south of the crossing. He was driving a team of horses attached to a farm wagon with a hay-rack and rigging thereon, and drove along such highway and upon the crossing without stopping. The team he was driving was gentle and easily controlled. Appellee was driving and controlling the team. The train that struck appellee was running about thirty-two miles per hour. Appellee was traveling about three miles per hour. Appellee neither slackened nor varied the speed of his team from the time he entered upon the highway until he was struck. Appellee and his hired man were alone on the wagon. As they drove along the highway they were talking together as to whether the train had passed. Appellee knew a regular passenger train was about due and liable to pass over the crossing at any time. The train that struck appellee (a regular passenger train) was substantially on time. The train was composed of a locomotive weighing about thirty-five tons, a baggage car and coaches. Appellant's track was opposite

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and north of the point where appellee came upon the highway, and the track toward the crossing came nearer the highway from such point to the crossing. The ground between the highway and the railroad from the point where appellee came into the highway was in the form of a triangle, with the sharp angle at the point of intersection. Appellee could not have heard the noise of the train 100 feet south of the crossing if he had listened attentively, because the train was too far away. Appellee did not at any time after coming upon the highway stop and listen for the approaching train. Appellee had at intervals a view of the railroad track as he approached the crossing, by looking between the rows of trees in the orchard. The south side of the orchard was 300 feet from the crossing. There was a triangular piece of ground 105 feet south of the crossing along the highway, with its south line 116 feet from the highway to the track, and crossing to a point at the crossing, upon which there was no obstruction to the view of the track by a person on the highway, except an ordinary barbed wire fence along the right of way; that appellee, if he had looked attentively before going on the crossing from a point thirty-five feet from the center of the crossing, would have had a clear view of appellant's track to the southeast, the direction from which the train was coming, for the distance of 300 feet or more. If appellee had stopped and looked in the direction from which the train was coming, at a point twenty feet south of the crossing, he could have seen the approaching train; if he had stopped and listened within thirty feet of the crossing, appellee could have heard the noise of the train. The crossing was an extraordinarily dangerous one, as to trains coming from the south. From the point where appellee came upon the highway to a point 105 feet south of the crossing, the highway was substantially level. The crossing was about four feet lower than at a point 105 feet south, and the grade gradually descended from such point. The highway was on higher ground than the railroad track.

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From a point 300 feet south of the crossing, and from there to the crossing; the view of appellant's track and approaching train was not so obstructed by trees as to prevent a person riding in a wagon from seeing a train approaching from the south, if such train was directly east.

By the general verdict, the jury found that appellee established by a preponderance of the evidence every fact essential to his right to recover under the allegations of his complaint. To state it more pointedly, by the general verdict the jury found the three concurrent propositions that must exist before liability in such case arises: (1) Negligence on the part of appellant; (2) that such negligence was the proximate cause of the injury complained of; (3) that appellee's negligence did not contribute to his injury. That these three elements must exist before liability attaches, see *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374.

The general verdict must stand, as against the facts specially found, unless such facts affirmatively show that one or more of the necessary elements established by the general verdict does not exist, or is untrue. If the facts specially found show that appellant's negligence was not the proximate cause of appellee's injury, or that appellee's own negligence contributed to his injury, then, in either event, such facts would be in irreconcilable conflict with the general verdict, and would control, for, both by statute and repeated judicial decisions, where "the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Section 547 Horner 1897; *Rogers v. City of Bloomington*, 22 Ind. App. 601, and authorities there cited; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318; *Bachman v. Cooper*, 20 Ind. App. 173; *Rouyer v. Miller*, 16 Ind. App. 519; *Ohio, etc., R. Co. v. Heaton*, 137 Ind. 1. The conflict between the general verdict and facts specially found must be so marked that they cannot be reconciled upon any supposable facts provable under the issues, for we

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must indulge all reasonable presumptions in favor of the general verdict, and cannot presume anything in favor of the special findings. *Louisville, etc., R. Co. v. Creek*, 130 Ind. 139, 14 L. R. A. 733; *Shuck v. State*, 136 Ind. 33; *Lake Erie, etc., R. Co. v. McHenry*, 10 Ind. App. 525; *Keeley, etc., Co. v. Parnin*, 13 Ind. App. 588.

It is clear that the answers to the interrogatories are in harmony with the general verdict, in so far as the negligence of the appellant is concerned, for the jury specifically found that the bell upon the locomotive was not rung continuously from a point not less than eighty nor more than 100 rods from the crossing, until such engine had fully passed the crossing. This the statute, §5307 Burns 1894, §4020 Horner 1897, lays upon the railroad as a duty, and a failure to perform such duty is negligence *per se*. *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524; *Pittsburgh, etc., R. Co. v. Shaw*, 15 Ind. App. 173. And we can not say that there is any conflict between the general verdict and the answers to interrogatories on the proposition that appellant's negligence was the proximate cause of appellee's injury. Question ten propounded to the jury, and the answer thereto, are as follows: "Was not the failure of the defendant's employes * * * to sound the whistle not less than 100 rods from the crossing, and to ring the bell continuously from that point to the crossing the 'approximate' cause of the plaintiff's injury?" Answer. "It might have been." By answers to other interrogatories, it was found that the whistle was sounded, so that we must take the answer to question ten as having reference to the failure of appellant to ring the bell. We cannot regard the answer as establishing the fact that the failure to ring the bell was the proximate cause of appellee's injury, for the answer, at most, is evasive and negative, and does not establish any fact. So that the fact established by the general verdict, that such failure was the proximate cause of the injury, must

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remain unimpeached by any fact established by the special finding of facts.

This leaves but one question for consideration, and that is, do the facts found show that appellee was guilty of negligence contributing to his injury? We may very easily determine this question by a reference to a few pertinent and salient facts, as they are made to appear by the answers to interrogatories. Appellant was well acquainted with the crossing and surrounding country; he was in full possession of his faculties; his eyesight and hearing were unimpaired; he was traveling on a public highway, in a farm wagon, on which was a hay-rack and rigging, approaching and intending to cross appellant's railroad track where it intersected the highway; the crossing he was approaching was extraordinarily dangerous from trains approaching from the south; he knew that a regular passenger train was about due, if it had not already passed; as he approached the crossing he was talking with his servant about the train; from the time he entered upon the highway, about 500 feet from the crossing, he was driving about three miles per hour, and did not stop at any time to "look and listen"; at several points from about 300 feet from the crossing he could have seen appellant's track and approaching train by looking between the rows of trees between the highway and the track; when he got within thirty-five feet of the track, if he had looked in the direction from which the train was coming, he would have had an unobstructed view along the track in such direction 300 feet; appellee did not slacken the speed of his team or vary its rate of speed from the time he entered the highway until he drove on the track and was struck by the train; he was approaching a crossing where the railroad crossed the highway at an angle of about forty-five degrees; if appellee had stopped and looked down the track from the direction from which the train was coming, at a point in the highway twenty feet from the track, he could have seen the approaching train; if he had stopped and listened

at a point thirty-five feet from the track, he could "have heard the noise and discerned the train approaching;" the train was running about thirty-two miles per hour. This succinct statement of the material facts found is sufficient upon which to apply the law and determine the question of appellee's negligence or non-negligence. Taking the answer of the jury to the question inquiring of them the rate of speed the train was running, we find that it was going thirty-two miles per hour. At a point thirty-five feet from the track, appellee, if he had stopped and listened, could have heard the noise and discerned the approaching train. From the same point he could, if he had looked, have seen down the track from the direction from which the train was coming, a distance of 300 feet or more. At a point twenty feet from the track, if appellee had looked in the direction of the train, he could have seen it approaching. He was driving about three miles per hour, and had a gentle team that was easily controlled. If appellee was driving only three miles an hour, his team must have been going in a slow walk. At the rate of three miles an hour, he would go a distance of about four feet in a second. At a distance of thirty-five feet from the track, it would take him, in round numbers, eight seconds to reach the track. When he was thirty-five feet from the track, it took the train the same length of time to reach the crossing that it did him, for the train and wagon collided at the crossing. As the train was running at the rate of thirty-two miles an hour, by a simple mathematical calculation it is found that when appellee was thirty-five feet from the crossing, the train was 400 feet from the same point, for, at the rate of thirty-two miles an hour, it would run fifty feet in a second. As the jury find, as a fact, that appellee could have heard the noise of and discerned the approaching train, if he had stopped and listened, it must necessarily follow that if he had done so he had ample time to have avoided the collision. At a point twenty feet from the crossing he could have seen the train

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approaching. At a distance of twenty feet from the crossing, at the rate appellee was traveling, it would take him five seconds to reach it, and as appellee and the train reached the crossing at the same time, the train was 250 feet from the crossing when appellee was twenty feet from it, and hence it would have been in plain and full view of him if he had looked toward it when he was twenty feet from the track. If the facts so found constitute negligence on the part of appellee, then they are in irreconcilable conflict with the general verdict, and appellant's motion for judgment should have been sustained. A brief review of the authorities will suffice to determine this question. While there may be some confusion on the law of negligence, as declared by the adjudicated cases in this State, it seems to us that, as to the particular question now before us, the authorities in this jurisdiction are in harmony. Early in this State it was declared to be the rule that "when a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury." *Hathaway v. Railroad Co.*, 46 Ind. 25. And to this rule the courts of last resort in this State have uniformly adhered. *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31; *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449; *Cincinnati, etc., R. Co. v. Duncan*, 143 Ind. 524; *Smith v. Wabash R. Co.*, 141 Ind. 92; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Lake Shore, etc., R. Co. v. Boyts*, 16 Ind. App. 640; *Aurelius v. Lake Erie, etc., R. Co.*, 19 Ind. App. 584.

The fact that there were some obstructions which partially obstructed the view imposed upon appellee the duty of increased care in the use of his senses of sight and hearing. Beach Cont. Neg. (2nd ed.), §183. *Lake Shore, etc., R. Co. v. Boyts*, *supra*; *Towers v. Lake Erie, etc., R. Co.*, 18 Ind. App. 684; *Aurelius v. Lake Erie, etc., R. Co.*, *supra*. As was said in the latter case: "A person when in a place, or

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• while approaching a place of danger, must use care and caution commensurate to such danger; and where one approaches a point where a highway crosses a railroad track on the same level, it is his duty to proceed with caution, and, if he attempts to cross the track, either on foot or in a vehicle, he must use ordinary care, under the circumstances, in so doing. He must assume that there is danger, and act with ordinary care and prudence upon that assumption." As was said by Monks, J., in *Smith v. Wabash R. Co.*, 141 Ind. 92: "The question of care at railway crossings as affecting the traveler, is no longer, as a rule, a question for the jury. The *quantum* of care in a large class of cases is exactly prescribed as a matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively both ways for approaching trains, if the surroundings are such as to admit of that precaution. If a traveler by looking could have seen an approaching train in time to avoid injury, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw, such conduct is negligence *per se*." See, also, *Cincinnati, etc., R. Co. v. Duncan*, 143 Ind. 524; *Ohio, etc., R. Co. v. Hill*, 117 Ind. 56; Beach Cont. Neg. (2nd ed.), §§180, 181, and cases cited; *Lake Shore, etc., R. Co. v. Boyts*, 16 Ind. App. 640; *Towers v. Lake Erie, etc., R. Co.*, 18 Ind. App. 684.

The facts that it was time for a train to pass the crossing, that appellee was familiar with the surroundings, and was anticipating danger, were sufficient to warn him. The language of Monks, J., in *Smith v. Wabash R. Co.*, 141 Ind. 92, applies with significant force here, and the facts in the case before us bring it squarely within the rule there announced. At a safe distance from the crossing, appellee could have both heard and seen the approaching train, if he had stopped and listened, or had looked, and we must presume that he did not look, or that, if he did look, he did not heed what he saw. Under the authorities, such conduct was

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negligence *per se*. In *Lake Shore, etc., R. Co. v. Boyts*, 16 Ind. App. 640, if appellee had looked southward when within thirty feet of the nearest rail as he approached the crossing, he could have had an unobstructed view of the side-track, upon which a freight train was backing, for a distance of sixty feet. His failure so to look was held to be negligence that would bar his right to recover. In *Mann v. Belt R. Co.*, 128 Ind. 138, the court said: "When it is said that a person approaching a railroad crossing must look and listen attentively for approaching trains, it is not to be understood that he may look from a given point, and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such danger, would exercise to avoid injury." This means that a person approaching a railroad crossing, in order to avoid injury, must exercise continuing care and caution until the danger is past. In *Cadwallader v. Louisville, etc., R. Co.*, 128 Ind. 518, appellant was approaching a railroad crossing. Within twenty feet of the crossing she had an unobstructed view of the railroad track for 100 feet; and when within ten feet of the track she had such view of the track for 300 feet, and could have seen the approaching train before going upon the track, if she had looked. She did not look, but heedlessly stepped upon the track in front of a moving train, and was injured. Upon these facts, it was held she could not recover on account of her own negligence. As to what duty is required of a person about to cross a railroad track, while traveling upon a public highway, we cite the following cases: *Smith v. Wabash R. Co.*, 141 Ind. 92; *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 411, 32 L. R. A. 149; *Lake Shore, etc., R. Co. v. Boyts*, 16 Ind. App. 640; *Aurelius v. Lake Erie, etc., R. Co.*, 19 Ind. App. 584; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; *Cincinnati, etc., R. Co. v. Duncan*, 143 Ind. 524. What was said in the case last cited applies with great force to the facts here found. The court said: "Some of our cases hold that, where

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from any cause the crossing is more than ordinarily dangerous, it is the duty of one nearing the same to stop and listen for the sound that ordinarily follows a moving train. *Louisville, etc., R. Co. v. Stommel, supra.* The discharge of this duty was not proved. But it is contended that obstructions to the view eastward excused this duty. But the evidence does not show that the obstructions were so great as to shut out all sight. And if they had been complete, that fact imposed the duty of increased care in the use of the sense of hearing, and to that end he should have stopped and attentively listened. And had he done so, he must have heard * * * the noise of the running train. This the law required him to do under the circumstances."

There is no pretense that appellee, when within twenty feet of the track, looked in the direction from which the train was coming, or that he stopped and listened attentively within thirty-five feet of the track, when he could have heard the noise of the train. It being his duty both to look and listen, as settled by all the authorities, the facts specially found upon these questions are in irreconcilable conflict with the general verdict, as to the question of appellee's negligence, and cannot be harmonized with the general verdict upon any supposable state of facts provable under the issues. The appellant was entitled to judgment upon the answers to interrogatories, and the overruling of its motion therefor was error. The judgment is reversed, and the court below is directed to sustain appellant's motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, and render judgment accordingly.

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[No. 2,999. Filed January 12, 1900.]

PRINCIPAL AND AGENT.—*Refusal of Agent to Deliver Property Purchased.—Conversion.—Measure of Damages.—Wheat purchased by an agent for his principal is the property of the principal, and a re-*

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fusal of the agent to deliver to his principal wheat so purchased amounts to conversion by the agent, and the principal may in an action for damages recover a sum equal to the profit he might have made by a subsequent sale thereof. *pp. 691-694.*

PRINCIPAL AND AGENT.—*Refusal of Agent to Deliver Wheat Purchased for Principal. — Conversion. — Tender.*—Where, under an agreement between an agent and his principal, the agent was to purchase wheat for the principal, the latter to furnish money for that purpose whenever called upon to do so, but the agent failed to call for the money, and refused to deliver to the principal the wheat purchased, the principal in an action against the agent for the profits need not show a tender of the purchase price of the wheat so bought. *p. 694.*

CONVERSION.—*Complaint. — Profits.*—In an action by a principal against his agents for the conversion of wheat purchased by the latter as such agents, an allegation in the complaint that the plaintiff, as was well known by defendants, was buying and selling wheat for profit in various specified markets, and that immediately after the purchase of the wheat by defendants the market price in such markets advanced twenty cents per bushel above the price defendants paid, which amount was over and above the expenses of taking the same to such markets, and that he would have sold the same in such markets if delivery had not been refused, sufficiently showed that the amount of the profits lost by reason of the conversion was twenty cents per bushel. *pp. 691-694.*

From the Bartholomew Circuit Court. *Reversed.*

Marshall, Hacker, Ralph H. Spaugh and John Rynerson,
for appellant.

W. W. Lambert, for appellees.

BLACK, J.—In the complaint of the appellant against the appellees, which upon demurrer was held to be insufficient, it was shown that, on the 20th of July, 1897, in consideration that the appellant, at the request of the appellees, had retained and employed the latter as the agents of the former to buy wheat for him at Hartsville Crossing, Bartholomew county, Indiana, until such agency should be discontinued in some proper and legal way, and of two and one-half cents on the bushel to be paid by the appellant to the appellees, as and for their commission for such purchase, the appellees then promised the appellant to act as his agents, and to buy wheat for him at said town and vicinity, and to deliver it

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to him; that it was agreed by and between the parties that the appellant should furnish the appellees money with which to pay for the wheat so bought, whenever the appellees should request the same of him; that, pursuant to said contract, the appellees thereupon entered upon their duties as such agents, and between the 25th of July and the 17th of August, 1897, they bought a large quantity of wheat for the appellant, to wit, 5,000 bushels, at seventy cents a bushel; that the appellees delivered to the appellant of said amount so bought 3,000 bushels, and refused and still refuse to deliver to him the residue of the wheat so bought by them; that immediately after the time said wheat was bought, which the appellees refused to deliver to the appellant, the market price of wheat at Hartsville Crossing and vicinity greatly advanced, from seventy cents a bushel to ninety cents a bushel, and had greatly advanced in all other wheat markets; and the appellees held said wheat as their own, to obtain the advantage and profit to themselves of said advance in the market price of wheat; and the appellant did not know that the appellees would not deliver said wheat to him until after said advance in price; that appellant resided at Hope, in said county, at the time said contract was entered into and during the existence of said contract, and was buying and selling wheat for profit during all said time, and was before said time, and had been since, which the appellees well knew; that when said contract was entered into, and during its existence, the appellant was buying and selling wheat for profit in the markets of the cities of Indianapolis, Lawrenceburg, Louisville, Chicago, Milwaukee, Detroit, Minneapolis, St. Paul, Buffalo, and New York, at the market price in said markets, which the appellees well knew; that there was a good market for wheat in said cities, and wheat could always be sold at the market price, and said wheat which the appellees bought for the appellant under said contract was to be sold by him in said markets at the market price therein as soon as it was delivered to him by them,

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as they well knew; that the market price of wheat in said markets, after they bought said wheat and when they refused to deliver it to him, was twenty cents higher than the market price of wheat at Hartsville Crossing and vicinity when said wheat was bought, and the appellant's profit on said wheat was the difference between the market price in said markets and the market price at Hartsville Crossing and vicinity when said wheat was bought; that said wheat was worth in the markets where the appellant was selling his wheat, and where he intended to sell and would have sold said wheat, after the appellees bought said wheat, and when they refused to deliver it, the price of ninety cents per bushel, over and above the cost of carriage and all other expenses; that on the 17th of August, 1897, the appellees, still holding said wheat and refusing to deliver it to the appellant, notified him that they would no longer act as his agents; that the appellant had duly performed all the conditions of said contract on his part to be performed; that on the 4th of February, 1898, the appellant tendered to the appellees the purchase money of said wheat and their commission on the same, and demanded the delivery of said wheat, but they refused to deliver it, and still refuse; that at said time the market price of wheat in said markets in which the appellant was selling wheat, and intended to sell and would have sold said wheat, was ninety cents a bushel, over and above the cost of carriage and all other expenses. The appellant laid his damages at the sum of \$500, for which he demanded judgment.

When the wheat had been purchased by the appellees, as the agents of the appellant, it was his property, and he was entitled to make such profit thereon as might be made by sale thereof. *National Bank v. Seward*, 106 Ind. 264.

It appears, in substance and effect, from the complaint, that the agents immediately after purchasing the wheat refused to deliver it to the principal, and held it as their own, for the purpose of making for themselves the profit

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which the principal was entitled to make, and, while still holding the wheat and refusing to deliver it, they notified the principal that they would no longer act as his agents.

— Ordinarily, where the property of one is held by his agent, as such, a demand of possession and refusal must be shown to put the agent in the wrong, but demand and refusal, which constitute evidence of conversion, need not be shown where conversion may be otherwise proved. *Terrell v. Butterfield*, 92 Ind. 1.

To show a conversion of goods, it is not necessary that it be made to appear that the defendant has sold the goods, or that he has in any manner disposed of them, so that they are no longer in his possession. The exercise by one of dominion over the goods of another to the exclusion of the latter, in defiance of his rights, constitutes a conversion. *Gordon v. Stockdale*, 89 Ind. 240.

— In the averment of tender in the complaint, it is not alleged that the appellant tendered interest from the time of the purchase of the wheat to the date of tender; but it was not necessary to make a tender of any amount. The agreement was that the appellant would furnish money to pay for the wheat bought whenever the appellees should request it of him. The action was not for the recovery of the wheat, or of its value, but the pleading went upon the theory that the appellees were to retain the wheat, but were liable to the appellant for the profit which he had lost by their conversion of the property to their own use, in violation of their obligation under the contract of agency. The amount of this profit, and therefore the measure of damages, the appellant showed sufficiently by the averments relating to the purchase price and the increase in the market price. As was said, per Comstock, J., in *Tebbs v. Cleveland, etc., R. Co.*, 20 Ind. App. 192, 200: "The law presumes that the market value of a commodity can be obtained; a market price is not speculative nor conjectural."

The judgment is reversed, with instruction to overrule the demurrer to the complaint.

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NEVIAN v. POSCHINGER.

[No. 2,724. Filed January 23, 1900.]

JUDGMENTS.—*Execution*.—*Stay*.—*Garnishment*.—*Collusion*.—Where defendant, for the purpose of delaying the collection of a note sued upon, caused an action in attachment and garnishment to be instituted against the payee of the note in which defendant was joined as a garnishee, he is not entitled to a stay of execution, without bail, on the judgment to the extent of the amount claimed in the garnishee proceeding.

From the Floyd Circuit Court. *Reversed*.

C. L. Jewett and *H. E. Jewett*, for appellant.

H. M. Dowling, for appellee.

WILEY, C. J.—Suit by appellant upon a note for \$2,200. To the complaint, which was in the usual form, appellee answered in three paragraphs, as follows: (1) General denial; (2) plea of payment; (3) a partial answer, going to the sum of \$1,691.54 of the amount due, in which it is averred that, prior to the commencement of this action, the New Albany Ice Company, a Kentucky corporation, brought an action in the Jefferson Circuit Court in said state against appellant to recover a debt amounting to \$1,691.54, alleged to be due said company from appellant; that proceedings in attachment and garnishment were also taken in said action, and that appellee was summoned as garnishee, it being charged that he was indebted to appellant in the sum of \$1,691.54; that appellee was not indebted to appellant in any other sum; that said proceedings are yet pending in said Jefferson Circuit Court, and that appellee is liable to pay the said sum of \$1,691.54 into said court upon its order. The prayer of this paragraph of answer is that appellee “prays judgment as to said sum of \$1,691.54, whether the plaintiff ought further to prosecute his said action.” Appellant replied to the second and third paragraphs of answer in two paragraphs. The first was a general denial; the sec-

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ond was affirmative matter in avoidance of the third paragraph of answer, but as a demurrer was sustained to it, and no question is presented arising thereunder, it need not be noticed further. There was a trial by jury, which resulted in a general verdict for appellant for the full amount of principal and interest due on the note. The jury also found specially as to specific facts, inquired of them by way of interrogatories. Judgment was rendered on the verdict in favor of appellant, and, on appellee's motion, the court entered an order staying execution without bail as to \$1,691.54, until the determination of the action set up in the third paragraph of answer. Appellant excepted to such action of the court. He also moved to modify the judgment by striking out all that part of it relating to the stay of execution, which motion was overruled, and he excepted. While the assignment of errors contains several specifications, the real and only question presented is the action of the court in ordering the judgment stayed as to the sum of \$1,691.54, and in overruling appellant's motion to modify. The determination of either of these questions must necessarily settle the other.

Before entering upon a discussion of the principle involved, it is necessary to state the facts specially found, for they may materially aid us in arriving at a correct conclusion. The facts specially found are as follows: That no judgment had been rendered in the proceedings in the Kentucky court; that appellee had not filed an answer as garnishee therein; that appellee himself caused said action to be commenced; that appellee is making a defense in said action; that appellee is interested in having said action determined in favor of the New Albany Ice Company; that appellee will be benefited to a greater extent than all others in having said action decided in favor of said company; that appellee himself instituted said action for the purpose of delaying the collection of the note sued on in this action. It was also found that the New Albany Ice Company, on June 7,

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1897, instituted an action in the Kentucky court, as charged in the third paragraph of answer, against appellant to recover \$1,691.54, alleged to be due from him; that in said action appellee was summoned to answer as a garnishee; that said action was still pending, and that the amount due on the note, less \$1,691.54, was \$623.16.

The evidence is not in the record, and from the pleadings and facts specially found we are to determine whether or not the trial court was authorized in ordering a stay of execution without bail as to \$1,691.54 of the judgment, until the further order of the court, "to be made upon the determination of the cause" pending in the circuit court of Jefferson county, Kentucky, as set forth in the third paragraph of answer. Of the power and authority of a court of general jurisdiction to stay execution as to a judgment, or any part thereof, which it has rendered, where the facts warrant, and upon such terms as it may fix within legal or equitable rules, we have no doubt; but the exercise of such power or authority ought to be invoked in the clearest cases only, and where, without it, irreparable injury to one or the other of the parties to the judgment would follow. Appellee seeks to uphold the action of the court below in ordering a stay of execution upon two grounds: (1) That the Floyd Circuit Court was bound to give full faith and credit to the judicial proceedings of the court in Kentucky, when the same were properly brought to its notice; (2) where a debtor is joined as a garnishee in an attachment suit brought against his creditor by a third party, and the debt is thereby sought to be reached in the garnishee's hands, justice demands that no subsequent suit by the attachment defendant against the garnishee shall prejudice the rights of the latter while the prior suit is pending. In a very able brief, in which counsel for appellee has cited many authorities, our attention is called to the fact that three courses have been adopted and pursued by the courts to protect garnishee defendants in subsequent suits against them as debtors to former attach-

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ment defendants: (1) To allow a plea of the pending garnishment proceedings to be given in bar of the main action on the debt. (2) To allow such former suit to be pleaded in abatement of the subsequent action against the garnishee. This course has been pursued where, as in this case, the former action was commenced in a state foreign to that in which the principal action was brought. (3) To grant a continuance of the cause, or render judgment for the full amount of the debt with a stay of execution as to the whole or a part of the judgment, until the attachment and garnishee proceedings are finally determined. With these propositions we fully agree with counsel for appellee, but as the court below pursued the latter course, it is the only one we need consider.

In *Blair v. Hilgedick*, 45 Minn. 23, 47 N. W. 310, the court said: "When the defendant in an action is garnisheed by a creditor of the plaintiff therein, we apprehend the practice is for the court, on the proper application, to stay all proceedings before judgment, or permit judgment to be entered, with stay of execution as to the whole or a part of the judgment, as circumstances may require."

In *Montgomery, etc., Co. v. Merrick*, 61 Ala. 534, the court said: "When, as in the present case, the suits are pending in different courts, the court in which the defendant is suing the garnishee will, on a proper application, stay proceedings until the garnishment is determined, or render judgment with a stay of execution, which can be subsequently removed, or rendered perpetual, in whole or in part, as justice may require." To the same effect are the following cases: *Yazoo, etc., R. Co. v. Fulton*, 71 Miss. 385; *Crawford v. Slade*, 9 Ala. 887; *McFadden v. O'Donnell* 18 Cal. 160; *Howland v. Chicago, etc., R. Co.*, 134 Mo. 474. There are many other cases in harmony with the above, but they need not be cited. We have examined all the cases cited by appellee, and many others. In none of the cases, however, was the question of the *bona fides* of the attachment and garnishment proceedings questioned.

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The order in this case staying execution as to \$1,691.54 of the judgment was not made upon any application or proceeding where the parties could join issue and litigate the question before the court, but was made after verdict was returned, and after appellee's motion for a new trial had been overruled, upon his unsupported motion. Appellee's motion for stay of execution was based "*upon the proof in said cause,*" as expressed in the motion. The evidence, as we have seen, is not in the record, and hence we have no means of knowing what the "proof in said cause" was upon the question of appellee's right to have stay of execution. We must be guided, therefore, by the facts specially found. By their answer to question seven, the jury found that appellee caused the action in attachment and garnishment in the Kentucky court to be instituted "for the purpose of delaying the collection of the note sued on in this action". It was also found that that action was commenced June 7, 1897, and though this cause was not tried till January 2, 1898, appellee had not filed, at the time of the trial, his answer as a garnishee defendant. It was also found, as a fact, that appellee caused said action of attachment and garnishment to be instituted. These facts show beyond doubt that the proceedings in the Kentucky court were commenced in bad faith, with the sole end and only purpose in view of delaying and hindering the collection of the note here in controversy. We can not believe, under such facts, that appellee was entitled to any "equitable relief", as contended for by his learned counsel. It can not be the law that a garnishee, by collusion with his attachment plaintiff, can prejudice the rights of his *bona fide* creditor in the collection of his debt. In other words, garnishment can not borrow aid from the voluntary acts of the garnishee, as declared by Mr. Drake in his work on attachment. He says: "Garnishment rests wholly on judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee.

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Such acts will be regarded as void, so far as they interfere with the rights of third parties." Drake on Attach. (4th ed.), §451b. At §714, Drake on Attach., it is said: "In order to entitle one to plead an attachment as a conclusive defense, there should be no neglect, collusion, or misrepresentation on his part, in the progress of the attachment suit." A garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property or funds in his hands attached. He has no pecuniary interest in the matter, he does not have to pay costs, and he has discharged his full duty when he has let the law take its course between the original litigants. He has no right to favor one party more than another, and he should stand and act indifferent, and without prejudice to either party. See *Schindler v. Smith*, 18 La. Ann., 476. A garnishee must be a third person so far as the parties to the attachment proceedings are concerned. See Wade on Attach. §341; *Crosby v. Harlow*, 21 Me. 499; *Hoag v. Hoag*, 55 N. H. 172. It is just and equitable that a garnishee should be protected, to the end that he may not be compelled to pay the same debt twice, but to entitle him to such protection he should stand indifferent and without favor between the attachment plaintiff and defendant, and should act in the utmost good faith, to the end that the rights of all parties in interest may be fully protected. It would indeed be a monstrous, unjust, and unconscionable rule to allow a garnishee to stand behind and use as a shield to prevent the collection of a just debt a colorable litigation, conceived and begun and prosecuted by him, and which was instituted to prevent the collection of the debt for which he is sued. To uphold the action of the lower court in ordering that the judgment rendered in favor of appellant should be stayed as to \$1,691.54 of it, we would have to subscribe to the rule which we have just characterized as "monstrous, unjust, and unconscionable." This we can not do.

Upon the record as it comes to us, the court was not authorized or warranted in ordering that, as to \$1,691.54 of

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the judgment rendered, no execution should issue until the determination of the cause of action in the Jefferson Circuit Court, in the state of Kentucky, of the New Albany Ice Company against appellant, as attachment defendant, and appellee as garnishee defendant. The appeal is sustained, and the court below is directed to overrule appellee's motion to stay execution as to \$1,691.54 of the judgment, and to strike out all that part of the judgment and order pertaining thereto.

STATE OF INDIANA v. TRUEBLOOD ET AL.

[No. 3,181. Filed October 10, 1899.]

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, and *J. A. Zaring*, for State.

Matson & Giles, Edwards & Edwards and *Hottel & Lawler*, for appellees.

WILEY, J.—The record in this case presents the same question as in case of *State v. Trueblood*, ante, 81, and upon the authority of that decision, the judgment is affirmed.

THE FIDELITY TRUST & SAFETY VAULT COMPANY,
RECEIVER, ETC., v. THE CITY OF ALEXANDRIA.

[No. 3,049. Filed October 26, 1899.]

From the Madison Superior Court. *Affirmed.*

J. W. Lovett and *F. E. Holloway*, for appellant.

F. A. Walker, F. P. Foster and *J. A. May*, for appellee.

HENLEY, J.—The questions presented by the record in this case are essentially the same as are presented in the case of *DePauw Plate Glass Co. v. City of Alexandria*, 152 Ind. 443. Upon the authority of that case, the judgment of the lower court in this cause is affirmed.

Equitable Nat. Bank v. First Nat. Bank.

SCHEIBER v. UNITED TELEPHONE COMPANY.

[No. 2,872. Filed October 27, 1899.]

From the Huntington Circuit Court. *Transferred to the Supreme Court.*

M. L. Spencer and W. A. Branyan, for appellant.

J. B. Kenner and U. S. Lesh, for appellee.

WILEY, J.—Appellant sued appellee to recover damages for an injury received by a bolt or current of lightning inducted into his office by an alleged defective telephone wire placed and left there by appellee. The complaint is in three paragraphs, and in each of them appellant demands judgment in the sum of \$5,000. To each paragraph of complaint appellee addressed a demurrer, which was sustained, and appellant refusing to plead further or amend, judgment was rendered against him for costs. This is therefore an action seeking the recovery of a money judgment only, and the amount in controversy being more than \$3,500, as shown by the prayer of the complaint, the jurisdiction is in the Supreme Court. This court has not jurisdiction, and the case is ordered transferred to the Supreme Court. *Williams v. Citizens, etc., Co.*, 153 Ind. 496.

**EQUITABLE NATIONAL BANK OF CINCINNATI, OHIO, v.
FIRST NATIONAL BANK OF AUBURN, INDIANA.**

[No. 2,910. Filed November 29, 1899.]

From the De Kalb Circuit Court. *Affirmed.*

D. M. Link, for appellant.

J. W. Baxter and C. M. Brown, for appellee.

HENLEY, J.—The only error assigned in this cause is that the lower court erred in overruling appellant's motion for a new trial. Under this assignment it is argued that the verdict and judgment are not sustained by the evidence. Upon a careful examination of the evidence, we think the conclusion reached by the lower court was right. Judgment affirmed.

Weaver v. Elliott.

WEAVER v. ELLIOTT, ASSIGNEE, ET AL.

[No. 2,882. Filed June 8, 1899. Rehearing denied Oct. 24, 1899.]

From the Howard Superior Court. *Affirmed.*

W. C. Overton, for appellant.

M. Bell, W. C. Purdum, J. C. Herron, F. N. Stratton, J. C. Blackledge, C. C. Shirley and *C. Wolf*, for appellees.

HENLEY, J.—The record in this cause does not present any of the questions argued by appellant's counsel. This action was commenced in the Howard Circuit Court, of Howard county, Indiana, and was transferred to the Howard Superior Court, where it was tried and the judgment rendered from which this appeal is taken. There is no certificate of the clerk of the Howard Circuit Court attached to this record authenticating that part of the record covering the proceedings in this cause in said last named court. This cause having been transferred to the Superior Court without a transcript being made and certified at the time, it became necessary under the statute, in case of appeal, that the clerk of each of said courts respectively should authenticate by his certificate the proceedings in his court. Acts 1897, page 22, §10; *Garrigus v. Board, etc.*, 22 Ind. App. 303.

Judgment affirmed.

STATE OF INDIANA v. COSNER ET AL.

[No. 8,184. Filed January 8, 1900.]

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, *J. A. Zaring, S. B. Lowe* and *McHenry Owen*, for State.

C. C. Matson, J. Giles, J. C. Lawler, M. B. Hottel and *W. H. Edwards*, for appellees.

WILEY, C. J.—The question presented by the record in this case is the same as that decided in *State v. Robertson, ante*, 424, and upon the authority of that case, the judgment here is affirmed.

State v. Cosner.

STATE OF INDIANA v. COSNER ET AL.

[No. 3,185. Filed January 5, 1900.]

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, *J. A. Zaring*, *S. B. Lowe* and *McHenry Owen*, for State.

C. C. Matson, *J. Giles*, *J. C. Lawler*, *M. B. Hottel* and *W. H. Edwards*, for appellees.

WILEY, C. J.—The exact question decided by this court in the case of *State v. Robertson*, ante, 424, is presented for our consideration by the record now before us, and upon the authority of that decision the judgment here is affirmed.

STATE OF INDIANA v. TRUEBLOOD ET AL.

[No. 3,180. Filed January 31, 1900.]

From the Lawrence Circuit Court. *Affirmed.*

W. L. Taylor, Attorney-General, *J. A. Zaring*, *S. B. Lowe* and *McHenry Owen*, for State.

J. C. Lawler and *M. B. Hottel*, for appellees.

WILEY, C. J.—The same question presented here by the record was decided by this court in the case of *State v. Robertson*, ante, 424, and, upon the authority of that decision, the judgment in the case now before us is affirmed.

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ABATEMENT—See PLEADING.

Where it does not appear in the complaint that there was no jurisdiction of the person, an objection on that ground, by plea in abatement, after an appearance and demurrer, comes too late.

See PLEADING, 11; *Fort Wayne Ins. Co. v. Irwin*, 53.

Pleading—No error was committed in sustaining a demurrer to an answer in abatement which alleged facts going to the merits of the cause, and not to its abatement. *Sloan, Adm., v. Lowder*, 118.

ACCIDENT INSURANCE—

1. *Notice of Injury.—Waiver.—Pleading.*—An allegation in a complaint on an accident insurance policy that plaintiff gave defendant due notice of his injury at the home office of the company, “and that said notice was accepted by the defendant as sufficient notice, and without objection,” is a sufficient averment of a waiver of a provision in the policy requiring a written notice to be given to the association at its home office within ten days after the injury. *Commercial Travelers, etc., Assn., v. Springsteen*, 657.
2. *Voluntary Exposure.—Negligence.*—The fact that plaintiff was guilty of negligence contributing to his injury will not defeat a recovery on an accident insurance policy conditioned that it should not cover injuries received from voluntary exposure to unnecessary danger, where the jury found that plaintiff had no knowledge of the danger. *Ib.*
3. *Notice.—Waiver.—Evidence.*—Where a complaint, in an action on an accident insurance policy, sufficiently averred a waiver of a provision of the policy requiring a written notice of injury to be given to the secretary of the association at its home office, the testimony of plaintiff as to an alleged conversation had by him with the secretary wherein he gave defendant notice of his injuries was properly admitted in evidence. *Ib.*
4. *Total Disability.—Instruction.*—An accident insurance policy contained a provision that no claims should accrue under the contract unless the injury should, “independently of all other causes, immediately and wholly disable the insured from performing any and every kind of business pertaining to his occupation,” etc. *Held*, that the court properly instructed the jury that plaintiff could recover if he was disabled to the extent that he could not do any and all kinds of business pertaining to his occupation. *Ib.*
5. *Interrogatories to Jury.*—Answers to interrogatories, in an action on an accident insurance policy conditioned that it should not cover injuries from voluntary exposure to unnecessary danger, showing that plaintiff was injured by running into a wagon while riding a bicycle against a heavy wind, and that he could have avoided running into the wagon if he looked ahead, but that he was not conscious of existing danger when he received the injury, and that he did not knowingly and intentionally assume a risk, are not in conflict with a general verdict for plaintiff. *Ib.*

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ACTION—An action in tort for damages for live stock lost in shipment will not lie, where the contract for shipment exempted defendant from liability for injury from the particular cause charged. See **CARRIERS**, 3; *Parrill v. Cleveland, etc., R. Co.* 638.

1. *Violation of City Ordinance.*—An action to recover a penalty for the violation of a city ordinance is a civil action, and the rules of practice in civil suits apply.

City of Greensburg v. Cleveland, etc., R. Co. 141.

2. *Death.—Right to Recover for Death of Brother.—Pecuniary Loss.*—An action cannot be maintained by an administrator to recover damages, under §285 Burns 1894, for the death of his intestate for the benefit of the brothers of the deceased, where the deceased was under no legal obligation to contribute to their support, had not done so, and no fact existed forming a reasonable expectation of pecuniary benefit to them from the continuance of his life.

Wabash R. Co. v. Cregan, Adm., 1.

ADMINISTRATORS—See **EXECUTORS AND ADMINISTRATORS**.

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APPEAL AND ERROR—See **HARMLESS ERROR**; **LAW OF CASE**.

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1. *Appellate Court.—Jurisdiction.*—An appeal cannot be taken to the Appellate Court in an action originating before the mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed \$50.

City of Greensburg v. Cleveland, etc., R. Co., 141.

APPEAL AND ERROR—Continued.

2. *Consolidation of Cases on Appeal.*—In consolidated cases, two defendants against whom two separate judgments were taken, joined in one appeal, filing but one assignment of errors, one transcript, and one brief in behalf of both. The issues between the appellees and each of the appellants were the same, and a decision of the questions raised would be conclusive against either appellant. The appellees appeared and entered joinder in error, and the cause was submitted by agreement. *Held*, that a subsequent motion on the part of the appellees to dismiss the appeal, on the ground that a separate appeal should have been taken from each judgment, came too late. *Phoenix Ins. Co. v. Jacobs*, 509.
3. *Transcript.*—*Omission of Clerk's Certificate.*—Without the clerk's certificate to what purports to be the transcript, the record cannot be considered on appeal. *East Chicago, etc., Co. v. Siwy*, 564.
4. *Record.*—A specification that the court erred in overruling appellant's motion for a new trial presents no question where the motion is not in the record. *Lewis v. Albertson*, 147; *Willard v. Albertson*, 162.
5. *Record.*—*Motions.*—*Pleadings Stricken Out.*—Available error cannot be predicated upon the action of the court in striking out a cross-complaint where the motion and cross-complaint are not made a part of the record by bill of exceptions or by order of court. *Brackett v. Brackett*, 530.
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7. *Instructions.*—*Record.*—In order that instructions may be made a part of the record without a bill of exceptions the record must affirmatively show that they were filed. *Week v. Widgeon*, 405.
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9. *Bill of Exceptions.*—*Signature of Judge.*—*Presumption.*—Where the record shows that a bill of exceptions was signed by the judge and filed, it will be presumed that the judge signed the bill and that it was then filed. *Bradley, Holton & Co. v. Whicker*, 380.
10. *Record.*—*Instructions.*—Instructions given by the court of its own motion which are not signed by the judge are not properly in the record. *Hall v. State, ex rel.*, 521.
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APPEAL AND ERROR—Continued.

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18. *Assignment of Error. — Waiver.*—An assignment of error is waived by failure to discuss it.
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19. *Misjoinder of Causes of Action.*—A judgment will not be reversed on appeal on account of misjoinder of causes of action.
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20. *Joint Assignment of Error.*—No error is presented on a joint assignment as to the action of the court in sustaining a demurrer to several paragraphs of a pleading if either paragraph is bad.
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21. *Overruling Joint Demurrer.—Practice.*—Available error cannot be predicated upon the action of the court in overruling a demurrer addressed jointly to two paragraphs of a pleading unless both paragraphs are demurrable for the cause assigned against them.
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22. *Instructions.—Joint Assignment.*—A joint assignment in a motion for a new trial of the giving of two instructions is not available if either of the instructions is not erroneous.
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23. *Assignment of Error.—Overruling Motion for Judgment.*—An assignment of error that the court erred in overruling defendant's motion for judgment in her favor presents no question.
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Kahn v. Gavit, 274.
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Brackett v. Brackett, 530.
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27. *Assignment of Error.—Defect of Parties.*—An assignment of error "that there is a defect in parties plaintiff, in that necessary parties plaintiff have not been made" presents no question on review.
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28. *Pleading.—Answer.*—To sustain a demurrer to an answer is not available error where the defense set up therein affirmatively

APPEAL AND ERROR—Continued.

appears from a special finding of the jury within the issues to have no foundation in fact. *Phenix Ins. Co. v. Jacobs*, 509.

29. *Assignment of Error.*—Error in finding against appellant on a plea in abatement is not properly presented by an assignment that "the court erred in overruling and finding against appellant's plea in abatement herein filed." *Kahn v. Gavit*, 274.

30. *Assignment of Error.—Motion for Judgment, Notwithstanding the General Verdict.*—An assignment that the court erred in overruling the appellant's motion for judgment on the interrogatories, notwithstanding the general verdict, is improper, under the provisions of §556 Burns 1894, that when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Storrs & Harrison Co. v. Fusselman, 293.

31. *Assignment of Cross-Errors.*—No question is presented on an assignment of cross-errors where it does not appear when the assignment was made. *Bradley, Holton & Co. v. Whicker*, 380.

32. *Assignment of Cross-Errors.—Intervening Errors.*—Where the complaint is bad, a judgment in favor of defendant will be affirmed upon an assignment of cross-error on the sufficiency of the complaint, although subsequent errors intervened, if a right conclusion was reached. *Clark, Rec., v. Schromeyer*, 565.

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34. *Defective Cross-Complaint.—When Not Cured by Verdict.*—A defect in a cross-complaint is not cured by verdict where the opposite party presented the question of its sufficiency by demurrer.

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36. *Final Judgment.—Dismissal.*—Where a verdict was returned, a motion in arrest of judgment sustained on account of the insufficiency of the complaint, and the cause stricken from the docket, the case reached such an end that an appeal will lie.

Daugherty v. Midland Steel Co., 78.

37. *Conflicting Evidence.*—The Appellate Court will not determine the preponderance of conflicting evidence.

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38. *Evidence.—Objection.*—An objection to the admission of evidence on the ground that it is "incompetent, irrelevant and immaterial" is too general and indefinite to present any question on appeal.

Phenix Ins. Co. v. Jacobs, 509.

39. *Evidence.—Admissibility of.*—Where a question asked a witness was objected to by opposing counsel, but the overruling of the objection was not assigned as cause for a new trial, the question as to the admissibility of the evidence will not be considered on appeal. *Ib.*

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40. *Notice.—Process.—Railroads.—Receivers.—Corporations.—* Notice of a vacation appeal from a judgment in an action against the receiver of a railroad company, appointed by the United States Court, served upon a freight and ticket agent of defendant, within the State, constituted a sufficient service on the receiver, who resided outside the State. *Wolfe v. Peirce, Rec., 591.*
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44. *Replevin.—Decedents' Estates.—* An appeal by an administrator from a judgment in an action in replevin is not governed by §§2609, 2610 Burns 1894, relating to decedents' estates, where it was not a case growing out of a matter connected with the estate. *Sloan, Adm., v. Lowder, 118.*

APPELLATE COURT—Has no jurisdiction in an action originating before the mayor of a city, where the amount in controversy does not exceed \$50, see APPEAL AND ERROR, 1; *City of Greensburg v. Cleveland, etc., R. Co., 141.*

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2. *Transfer of Cause.—Questions Decided by Supreme Court.—* Questions which have been decided by the Supreme Court cannot be presented to the Appellate Court when the cause is transferred to such court. *Willard v. Albertson, 166.*
3. *Transfer of Cause from Supreme Court.—Constitutional Question.—Waiver.—* Where an appeal from a judgment foreclosing street improvement assessments was taken to the Supreme Court, and no question was raised as to the constitutionality of the law under which the improvements and assessments were made, and the cause was transferred to the Appellate Court, such question will be deemed to have been waived. *Lewis v. Albertson, 147.*

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ASSIGNMENT FOR BENEFIT OF CREDITORS—

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1. *Statute Must be Strictly Followed.*—Attachment proceedings being purely statutory, the statutory provisions relative thereto must be strictly followed. *United States, etc., Co. v. Isaacs, 533.*
2. *Affidavit.—Nature of Plaintiff's Claim.*—An affidavit in attachment which states that plaintiff's claim is for a balance due on a judgment in favor of the plaintiff, described in the complaint, and on account of goods sold and delivered, described in the complaint, sufficiently shows the nature of plaintiff's claim. *Ib.*
3. *Affidavit.*—An affidavit in attachment need not show that defendant has property subject to execution within the jurisdiction of the court. *Ib.*
4. *Affidavit.—Nature of Claim.—Reference May be Had to Complaint.*—Where the statement of the plaintiff's claim in an affidavit in attachment shows that it is one for which an attachment may issue, but is not so full as might be desired, reference may be had to the complaint to ascertain the precise nature of the claim. *Ib.*
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1. *Non Est Factum.—Bona Fide Holder.—Burden of Proof.*—Where in a suit on a note by a bank as indorsee the defendant filed a plea of *non est factum*, and introduced evidence showing that a material alteration was made in the note after its execution, without the knowledge or consent of defendant, to warrant a recovery the burden rested upon plaintiff to show that it was a *bona fide* holder for value. *Pope v. Branch, etc., Bank, 210.*
2. *Alteration of Note.—Instruction.*—An instruction in an action on a promissory note that if the note was signed and delivered with a blank space between the words "negotiable and payable at" and "bank" that the payee, or any indorsee thereof, had the right to insert the name of a bank was erroneous, where the evidence showed that the note was delivered with the understanding that it should not be payable in bank. *Ib.*
3. *Non Est Factum.—Alteration of Note.—Instruction.*—An instruction in an action on a promissory note that if the jury found that the note was delivered with the agreement that it was not to be payable at any bank, and that the payee inserted the name of a bank in a blank in the note before the word "bank," in violation of the agreement, and the note came to plaintiff in this condition, in the usual course of business, in good faith, for a valuable consideration, then you should find for plaintiff, because the note was regular upon its face when it bought it, is erroneous, as it was within the province of the jury to determine whether the note was regular upon its face. *Ib.*
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5. *Alteration of Note.—Bona Fide Purchaser.—Instruction.*—Where defendant interposed the plea of *non est factum* to an action on a promissory note, on account of a change made in the note after its execution, an instruction that if the evidence showed that the note came to plaintiff, in the usual course of business, in good faith, for a valuable consideration, before maturity, that the jury should find for plaintiff was erroneous, as it is the duty of a purchaser of negotiable paper, before maturity, to make inquiry as to its genuineness if there is anything about the paper itself, or the circumstances surrounding its presentation for discount, calculated to excite suspicion in the mind of a reasonably cautious person. *Pope v. Branch, etc., Bank, 210.*
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7. *Negotiable Instruments.—Bona Fide Purchaser.—Instruction.*—An objection to an instruction in an action on a promissory note, by an indorsee, because it uses the expression "without knowledge of defenses" instead of without knowledge of the facts which constituted the defense, is not well taken. *Ib.*
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BILLS AND NOTES—Continued.

negotiable, and plaintiffs are the owners thereof, and took it before maturity, in the usual course of business, without notice of any facts impeaching its validity between the original parties, then the plaintiffs hold same by a good title, free from all defenses that might have been made by defendant in the hands of the original owner, is not bad for failure to state that plaintiffs must appear to be *bona fide* purchasers acting in good faith. *Ib.*

9. *Action by Indorsee.—Burden on Plaintiff to Show that He is a Bona Fide Holder.*—In an action on a promissory note by an indorsee the burden is upon plaintiff to show that he is a *bona fide* holder, which includes proof that he obtained the note without notice of any defense, and the plaintiff may assume this burden in his complaint. *Bradley, Holton & Co. v. Whicker, 380.*
10. *Action by Indorsee.—Consideration.—Evidence.*—Where in an action on a promissory note by an indorsee a defense was interposed that the note was given for a patent right, evidence as to plaintiff's custom of loaning money and purchasing notes was properly excluded. *Pape v. Hartwig, 333.*
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12. *Commercial Paper.—Note Given for Patent Right.—Bona Fide Purchaser.—Notice.*—Where a note is offered for sale which is in form commercial paper, and is without any infirmity appearing upon its face, the purchaser is not put upon inquiry as to any equities existing between the original parties to the note. *Ib.*
13. *Consideration.*—An answer in an action on a promissory note alleging that the note was executed to take the place of a note past due, secured by a mortgage on a threshing machine, upon the agreement that the payee, in consideration thereof, waived his right to take possession of the property upon the maturity of the second note, and until such time as the defendants should be able to reimburse themselves out of the proceeds of running the machine, but that the payee took possession of the property before the defendants were reimbursed, shows a failure of consideration in the execution of the note. *Kenney, Rec., v. Wells, 490.*
14. *Transfer.—Presumption.*—Nothing appearing to the contrary, it will be presumed that a note was transferred on the day of its date. *Bradley, Holton & Co. v. Whicker, 380.*
15. *Corporations.—Notes Signed by Officers.—Liability of Parties.—Answer.—Parol Evidence.*—In an action on a promissory note by the indorsee it appeared by the note that defendant was payee in the body thereof, that the note was signed by a corporation, and by defendant and another, their signatures being followed by "Pres." and "Secy.," respectively. Credits amounting to \$3,500 were indorsed on the note, and the note was afterward transferred by defendant by indorsement, without recourse. Defendant answered that the note was given by the corporation for money advanced to it by him, and that the signatures of the president and the secretary were intended to bind the corporation only, all of which was known by his indorsee; that said indorsee afterward assigned the note to plaintiff who also had full notice and knowledge of the facts al-

BILLS AND NOTES—Continued.

leged, and that after defendant assigned the note the corporation paid the interest which was credited thereon by the first indorsee. *Held*, that the answer was sufficient to authorize the admission of parol testimony to determine the liability of the parties.

Holt v. Sweetzer, 237.

16. *City Warrant*.—A city warrant is not a negotiable instrument in such a sense as to protect a *bona fide* holder against defenses.

City of Hammond v. Evans, 501.

BONDS—Where a corporation signs a bond with a contractor to secure the performance of a contract, the corporation becomes a joint obligor. See **PRINCIPAL AND SURETY**, 4; *Wittmer Lumber Co. v. Rice*, 586.

A salesman's bond to his employer is a contract of suretyship, and not a collateral guaranty. See **PRINCIPAL AND SURETY**, 1; *Durand & Kasper Co. v. Rockwell*, 11.

1. *Signature.—Not Signed by All the Parties Named in Body of Bond.—Demurrer*.—The fact that a part of the persons named in the body of a bond did not execute it is not ground for a demurrer in an action against those who did sign it, but must be pleaded as a defense. *Davis v. O'Bryant*, 376.
2. *Signature.—Delivery.—Principal and Surety*.—Where a bond contains the names of other obligors, and is delivered without the signatures of all, the obligee must inquire whether those who have signed it consent to its delivery without the signatures of the others; but if there is nothing on the face of the bond to indicate that others are to sign it, and the bond is accepted on the faith of appearances, without notice that it is not to be delivered in its then shape, the party signing cannot question the validity of the delivery. *Ib.*
3. *Signature.—Delivery.—Principal and Surety*.—Where a surety signs a bond which is to be signed by another, whose name appears in the bond as coobligor, and the bond is delivered without such other person having signed it, and without the consent of the one who signed it, the delivery is a nullity, and the surety is not bound. *Ib.*
4. *Capias ad Respondendum.—Failure of Plaintiff to Sign Bond.—Action on Bond*.—The failure of the plaintiff to sign a bond in a proceeding in *capias ad respondendum* is not a defect of "form or substance or recital or condition," as contemplated by §1235 Burns 1894, and an action cannot be maintained on the bond by the defendant in such proceeding against the plaintiff.

Borman v. Jung Brewing Co., 399.

BROKERS—

1. *Commission.—Complaint.—Quantum Meruit* —A complaint upon the *quantum meruit* to recover a commission for services as a broker which alleges that plaintiff, at the special instance and request of defendant, procured a purchaser for a large general stock of merchandise, owned by defendant, which defendant desired to sell, and in all things complied with the request of defendant, is sufficient as against a demurrer, although it is not alleged that the purchaser was ready, willing, and able to purchase the stock, or that a sale was completed before the action was commenced, or prevented by defendant. *Miller v. Stevens*, 365.
2. *Commission.—Agreement to Furnish Purchaser*.—Where a broker is instrumental in bringing the owner of property and a

BROKERS—Continued.

purchaser together, and a sale or exchange is effected, the broker is entitled to a commission under a contract to furnish a purchaser to his principal. *Ib.*

3. *Commission.—Sales.—Condition Precedent.*—Plaintiff entered into a written agreement with defendant to negotiate the sale of certain bonds which the latter had agreed to take in payment for county work which he had contracted to do, the commission to be paid from the second payment realized from the sale of the bonds. Plaintiff procured a purchaser who was able and willing to buy the bonds under the terms prescribed in the contract, but before the bonds were delivered to plaintiff the sale thereof was declared illegal and perpetually enjoined. *Held*, that plaintiff was not entitled to the commission, since by the contract the payment was made to depend upon a contingency that never arose.

Owen v. Ramsey, 285.

BUILDING AND LOAN ASSOCIATIONS—

1. *Withdrawal.—Complaint.*—Section 8410 Horner 1897 provides that no stock shall be withdrawn from a building and loan association which is held in pledge for security or subject to a lien for the payment of unpaid instalments and other charges incurred thereon, and that not more than one-half of the funds in the treasury shall be applicable to demands of withdrawing stockholders, unless the board of directors in its discretion shall order otherwise. *Held*, that the complaint, in an action by a member for the withdrawal of his stock need not allege that the stock was not held in pledge for security, or subject to liens for the payment of unpaid instalments or other charges, and that there were funds in the treasury with which to pay the amount due on the withdrawal of his stock. *Huntington County, etc., Assn. v. Emerick, 175.*
2. *Withdrawal.—Notice.*—Notice to the secretary of a building and loan association of intention to withdraw stock from such association is insufficient, within the meaning of §8410 Horner 1897, which provides that "any stockholder wishing to withdraw from such corporation may do so upon three months' notice given to the board of directors." *Ib.*

CARRIERS—

1. *Contract.—Notice.*—Where a contract between a shipper of live stock and a common carrier provides for reasonable notice of claim, the giving of such notice being a condition precedent, it is a part of the plaintiff's cause of action to show performance of this precedent obligation on his part, or to show a waiver of performance. *Parrill v. Cleveland, etc., R. Co., 638.*
2. *Limitation of Liability.—Negligence.*—Where live stock is shipped under an express contract, which relieves the carrier from liability for loss occasioned by a specified cause, the carrier is not liable for loss occasioned by such cause, if the carrier was itself without fault or negligence. *Ib.*
3. *Shipment of Live Stock.—Loss in Transit.—Pleading.—Complaint.—Tort.*—In an action against a railroad company for loss of live stock in transit, the complaint alleged that plaintiff delivered to defendant certain live stock, to be transported by it as a common carrier; that the animals were loaded on a car furnished therefor by defendant, said car having open spaces at the sides and ends, and were bedded with hay, which was liable to be set on fire by sparks from the engine; that defendant, well knowing these

CARRIERS—Continued

conditions, placed the car near the engine, which had negligently been permitted to be and remain out of repair, by reason whereof, and by reason of its negligent and careless operation, sparks were emitted from the engine, the hay ignited and the live stock burned; wherefore plaintiff was damaged, etc. The defendant company filed answer in denial. *Held*, that the complaint stated a cause of action in tort, and that there could be no recovery where the evidence, on the trial, showed that the shipment was made under a written contract which, among other things, exempted the defendant from liability for any injury to the live stock caused by the burning of hay, straw, or other materials used for feed or bedding. *Ib.*

CITIES—See STREET IMPROVEMENTS.

Courts take judicial notice of the incorporation of cities.

City of Bedford v. Woody, 231.

Action against city for damages for personal injuries caused by defective sidewalk, see CONTRIBUTORY NEGLIGENCE; *City of Bluffton v. McAfee, 112.*

COMPLAINT—See PLEADING.

To recover commission for services as broker, see BROKERS, 1; *Miller v. Stevens, 365.*

In action to withdraw building and loan stock, see BUILDING AND LOAN ASSOCIATIONS, 1; *Huntington County, etc., Assn. v. Emerick, 175.*

In action on contract guaranteeing payment of promissory note, see CONTRACTS, 6; *Hernley v. Brannum, 388.*

In action for conversion, see CONVERSION, 1, 2; *McCreery v. Nordyke, 630; Nading v. Howe, 690.*

For damages for pollution of stream, see WATERS AND WATER COURSES; *Muncie Pulp Co. v. Martin, 658.*

In action by a creditor of a decedent's estate after estate is settled, see DECEDENTS' ESTATES, 1, 2, 3, 4; *Postal v. Kreps, 101.*

In suit upon an oral contract to insure, see INSURANCE, 11; *Western Assurance Co. v. McAlpin, 220.*

In action on fire policy, see PLEADING, 5; *Ft. Wayne Ins. Co. v. Irwin, 53.*

A complaint on a fire insurance policy must allege that plaintiff was the owner of the property at the time it was destroyed. See INSURANCE, 12, 13; *Farmers Ins. Co. v. Burris, 507.*

In action to enforce a judgment, see PLEADING, 6; *City of Hammond v. Evans, 501.*

In action to foreclose mechanic's lien, see MECHANICS' LIENS, 4; *Northwestern, etc., Assn. v. McPherson, 250.*

Sufficiency in action for personal injuries, see MASTER AND SERVANT, 1, 4, 5, 7; *Consolidated Stone Co. v. Redmon, 319; Daugherty v. Midland Steel Co., 78.*

Against a railroad company for stock killed on track, see PLEADING, 1, 2; *Chicago, etc., R. Co. v. Spencer, 605.*

COMPLAINT—Continued.

In replevin, see **REPLEVIN**, 2, 3; *Goodman v. Sampliner*, 72; *West, Tr., v. Graff*, 410.

In action to foreclose assessment for street improvements, see **STREET IMPROVEMENTS**, 6, 7, 8, 9, 10, 11, 12; *Lewis v. Albertson*, 147.

For failure of telegraph company to transmit message, see **TELEGRAPH COMPANIES**, 1, 2, 3; *Western Union Tel. Co. v. Henley*, 14.

In an action on a written undertaking, guaranteeing payment of a note, see **GUARANTY**, 1, 2; *Hernley v. Brannum*, 388.

CONTINUANCE—

Withdrawal of Juror.—Dismissal and Nonsuit.—During the progress of a trial plaintiff moved for leave to file an amended complaint, which was sustained, and he thereupon asked leave to withdraw a juror, which was granted, and the court discharged the jury and continued the cause over defendant's objection and motion to dismiss. *Held*, that the withdrawal of the juror was superfluous and gave plaintiff no additional rights, and that defendant's motion to dismiss should have been sustained.

Wabash R. Co. v. McCormick, 258.

CONTRACTS—As to contract between husband and wife for the support of the latter, see, **HUSBAND AND WIFE**, 1; *Scherer v. Scherer*, 384.

Where a defense is based upon a contract not in writing, and the contract appears upon the trial to be a written one, the defense must fail. See **PLEADING**, 16, 17; *Perkins, etc., Co. v. Yeoman*, 483.

1. *Alteration.—Release of Surety.*—A change in a contract to remodel a house by substituting frame for brick in the construction of the second story, and shingling instead of weather-boarding on the frame portion, made without the knowledge or consent of the sureties on a bond executed to secure the performance of the contract, is not such a material alteration as will release the sureties, where the contract provided "that any necessary or desired changes may be made in the plans and specifications for said building during the progress of the work thereon without in any manner affecting the validity of the contract." *Higgins v. Quigley*, 348.
2. *In Conflict with City Ordinance.—Alteration of Contract.—Validity.*—Where the manner of constructing a building as provided by the plans and specifications was prohibited by a city ordinance, such contract was not thereby rendered invalid, where the contract provided that any necessary or desired changes might be made in the plans and specifications during the progress of the work without affecting the validity of the contract, and the plans were changed so as not to conflict with the provisions of the ordinance. *Ib.*
3. *Alteration.—Parties.*—An answer to an action on a bond given to secure the performance of a building contract that a new and different contract was entered into without the knowledge or consent of the sureties, signed by but one of the plaintiffs, and thereby substituted different contracting parties, is insufficient, where the complaint averred that the contract was signed on behalf of both plaintiffs, since the capacity in which plaintiff signed the contract may be proved by parol. *Ib.*
4. *Breach.—Recovery.—Quantum Meruit.—Master and Servant.*—Where an employe has entered upon the service under a contract,

CONTRACTS—Continued.

and has performed work which has been accepted by the employer, but commits a breach of the contract, and is discharged, he cannot recover on the contract, but can sue only on the *quantum meruit*.

Fulton v. Heffelfinger, 104.

5. *Breach.—Recovery.—Quantum Meruit.—Master and Servant.—*

Where an employe engaged in the proper performance of the contract is prevented from completing the stipulated service by his employer, in violation of the contract, he may recover the reasonable value of his work, not exceeding the contract price, upon a *quantum meruit*, or may sue upon the contract for the breach thereof. *Ib.*

6. *Guaranty.—Complaint.—*Plaintiff was the holder of a note executed by P for the sum of \$1,528.81, with a balance remaining due of about \$1,000, secured by mortgage on certain described real estate. Defendants guaranteed the payment of a certain note executed by P for the sum of \$1,000, payable to the order of plaintiff, in consideration that plaintiff release from a mortgage certain lots. *Held*, that the complaint was sufficient without asking for a reformation of the contract. *Hernley v. Brannum, 388.*

CONTRIBUTORY NEGLIGENCE—See MASTER AND SERVANT; NEGLIGENCE; STREET RAILROADS.

When degree of care is a question for the jury, see NEGLIGENCE, 1; *City of Bedford v. Woody, 231.*

*Personal Injuries.—Defective Sidewalk.—Cities.—*Plaintiff recovered a judgment for damages for injuries caused by a defective sidewalk. Answers to interrogatories showed that she was walking carefully along the sidewalk, wheeling a baby carriage in front of her, and stepped into a hole in the alley crossing and was injured; that she could see the walk within a distance of ten feet in front of her, but the hole was at the near side of the alley crossing, which was four inches lower than the sidewalk, and the view thereof was obstructed. *Held*, that the answers were not in conflict with the general verdict upon the question of contributory negligence.

City of Bluffton v. McAfee, 112.

CONVERSION—Of property by agent, see PRINCIPAL AND AGENT, 1, 2; *Nading v. Howe, 690.*

1. *Complaint.—*A complaint for conversion alleging that defendant, as agent and employe of the plaintiff, received from the latter certain goods, wares, and merchandise to be sold for defendant, and that plaintiff converted a part of such goods to his own use, sufficiently avers ownership by the plaintiff in the property converted, as against an objection raised for the first time in the assignment of errors. *McCreery v. Nordyke, 630.*

2. *Complaint.—Profits.—*In an action by a principal against his agents for the conversion of wheat purchased by the latter as such agents, an allegation in the complaint that the plaintiff, as was well known by defendants, was buying and selling wheat for profit in various specified markets, and that immediately after the purchase of the wheat by defendants the market price in such markets advanced twenty cents per bushel above the price defendants paid, which amount was over and above the expenses of taking the same to such markets, and that he would have sold the same in such markets if delivery had not been refused, sufficiently showed that the amount of the profits lost by reason of the conversion was twenty cents per bushel. *Nading v. Howe, 690.*

CORPORATIONS—Note signed by officers, see **BILLS AND NOTES**, 15; *Holt v. Sweetzer*, 237.

A corporation, becoming surety on a contractor's bond for payment of all obligations created for materials to be furnished for the construction of a building, is estopped to plead *ultra vires* to its liability on the bond. See **PRINCIPAL AND SURETY**, 5; *Wittmer Lumber Co. v. Rice*, 586.

1. *Consolidation.—Liability of New Corporations for Debts of Consolidating Companies.*—Where a new corporation is formed out of old ones, and the assets of the old ones are turned over to it as a part of its assets, the new or consolidated corporation will be liable for the debts of the constituent corporations, to the extent of the property or assets thus acquired.

United States, etc., Co. v. Isaacs, 533.

2. *Action Against Consolidated Corporation for Debt of a Constituent Company.—Complaint.*—In an action against a new corporation formed by consolidating several old ones, to recover a debt due from one of the consolidating corporations, it is not necessary to allege in the complaint, nor to prove on the trial, that the transfer of the stock to the new corporation was without consideration. *Ib.*

COUNTIES—Not liable to a city located in the county for board of prisoners in city jail. See **PRISONS**; *City of Alexandria v. Board*, etc., 110.

Change of Venue.—Costs.—Attorney's Fees for Defending Poor Person.—The board of county commissioners has exclusive jurisdiction of claims against the county, and an allowance made attorneys for defending a poor person, under §§1847, 1848 Burns 1894, by the court of the county to which a change of venue had been taken is not conclusive against the county from which the cause was removed, but is only *prima facie* evidence of the correctness of the amount allowed. *Board, etc., v. Board, etc.*, 330.

COUNTY COMMISSIONERS—

1. *Allowance of Illegal Claim.—Criminal Prosecution.—Curative Act.*—An indictment returned against the board of county commissioners for allowing a claim against the county for the expenses of holding a gravel-road election, contrary to the provisions of §6924 Burns 1894, was properly quashed after the passage of the act of February 24, 1899 (Acts 1899, pp. 128-130), which legalized such payments. *State v. Trueblood*, 31.

2. *Allowance of Illegal Claim.—Indictment.—Criminal Law.*—An indictment alleging that the members of a board of county commissioners allowed a claim against the county which they knew to be illegal does not charge a crime under the provision of §2018 Horner 1897 that "any officer under the Constitution or laws of this State * * * who fails to perform any duty in the manner and within the time prescribed by law, shall, upon conviction thereof be fined," etc. *State v. Robertson*, 424.

COURTS—See **APPELLATE COURT**; **JUDGES**.

When appointment of special judge need not be in writing, see **JUDGES**; *Lewis v. Albertson*, 147.

1. *Jurisdiction of Circuit Court in Actions in Tort.*—Under §1366, as construed with §1500 Burns 1894, the circuit court has concurrent jurisdiction with justices of the peace in actions in tort, where the amount claimed is less than \$100.

Chicago, etc., R. Co. v. Spencer, 605.

COURTS—Continued.

2. *Adjourned Term.—Presumption as to Regularity.*—It will be presumed in the absence of any showing to the contrary that the time for holding an adjourned term of court was properly fixed by the regular judge, and due notice given thereof. *Lewis v. Albertson*, 147.
3. *Adjourned Term. — Special Judge. — Appointment. — Jurisdiction.—Waiver of Objections.*—Where a special judge was appointed to try a cause at an adjourned term, and defendant appeared and filed demurrer, on separate days, and thereafter objected to the jurisdiction, solely upon the ground that the adjourned term was not regularly called, such action amounted to a waiver of any objection as to the regularity of appointment. *Ib.*
4. *Special Judge. — Jurisdiction. — Objection. — Waiver.*—An objection to the jurisdiction of the court is waived where the party in the same motion asked for a continuance. *Ib.*

CRIMINAL LAW—Indictment of county commissioners for allowing illegal claim, see COUNTY COMMISSIONERS, 1, 2; *State v. Trueblood*, 31; *State v. Robertson*, 424.

Prosecution for permitting persons in saloon during prohibited hours, see INTOXICATING LIQUORS; *State v. Rosenbaum*, 236.

Sufficiency of affidavit and information to charge an offense, under §2271 Burns 1894, for failure to list property for taxation, see TAXATION; *State v. Hilgendorf*, 207.

Affidavit.—Evidence.—Variance.—Assault and Battery.—A variance in the affidavit and evidence in a prosecution for an assault and battery as to the initial letter of the middle name of the person on whom the offense was committed is not fatal. *Ratcliff v. State*, 64.

DAMAGES—See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILROADS; TELEGRAPH COMPANIES.

For personal injuries from defective sidewalk, see CONTRIBUTORY NEGLIGENCE; *City of Bluffton v. McAfee*, 112.

For destruction of property by reason of negligence of natural gas company, see NATURAL GAS, 1, 2; *Indiana, etc., Gas Co. v. New Hampshire Ins. Co.* 298; *Ibach v. Huntington Light, etc., Co.*, 281.

For pollution of stream, see WATERS AND WATER COURSES; *Muncie Pulp Co. v. Martin*, 558.

Excessive damages in an action for maintaining a nuisance, see NUISANCE, 2; *Cleveland, etc., R. Co. v. King*, 573.

1. *Instructions.*—Where, in an action for damages to farm land caused by the pollution of a stream, an instruction was given at the request of defendant limiting the measure of damages to the difference between the rental value of the farm as it was with the polluted stream and as it would have been if the stream had not been polluted, and such additional damages as resulted from the destruction of timber, a verdict will not be set aside as excessive, where it is not manifest from the special findings that the jury did not keep within the rule laid down in the instruction as to the measure of damage. *Muncie Pulp Co. v. Martin*, 558.
2. *Review.*—The verdict of the jury in an action for damages on account of personal injuries will not be disturbed on appeal as excessive, unless the amount is so excessive as to indicate prejudice, partiality or corruption. *City of Bluffton v. McAfee*, 112.

DEATH—As to right to recover for death of a brother, see **ACTION**, 2; *Wabash R. Co. v. Cregan, Adm.*, 1.

DECEDENTS' ESTATES—See **EXECUTORS AND ADMINISTRATORS**; **WILLS**.

When an appeal by an administrator from a judgment in an action in replevin is not governed by §§2609, 2610 Burns 1894, see **APPEAL AND ERROR**, 44; *Sloan, Adm., v. Lowder*, 118.

1. *Desperate Claims.—Suit by Creditor.—Complaint.*—A complaint by a creditor of a decedent's estate, in an action on a claim due the estate, which does not state that the claim sued on was filed by the administrator for the benefit of creditors, and fails to allege that any attempt was made by plaintiff to collect his debt, or that it was ever filed against the estate, does not state a cause of action. *Postal v. Kreps*, 101.

2. *Desperate Claims.—Suit by Creditor.*—Where an estate has been finally settled, a creditor whose claim remains in whole or in part unpaid may bring suit in his own name upon claims filed by the administrator for the benefit of the creditors of decedent. *Ib.*

3. *Desperate Claims.—Suit by Creditor.*—Where an administrator files in court claims due the estate for the benefit of the creditors, heirs, and legatees of decedent, suit may be brought thereon, in the manner provided by statute, while the estate is pending, or after final settlement and discharge of the administrator. *Ib.*

4. *Desperate Claims.—Suit by Creditor.—Administrator De Bonis Non.*—Where a claim due an estate never came into the possession of the administrator, and the administrator was discharged without administering on the claim, a creditor's remedy is through an administrator *de bonis non*, under §2895 Burns 1894, not by an action on the claim. *Ib.*

5. *Parent and Child.—Funeral Expenses of Child.*—The funeral expenses of a minor do not constitute a charge against his estate, where he leaves a father surviving him who is able to pay them. *Rowe v. Raper*, 27.

DEMURRER—See **PLEADING**.

As to form of, see **PLEADING**, 12, 13, 14, 15; *Kenney, Rec., v. Wells*, 490; *Chicago, etc., R. Co. v. Spencer*, 605; *Storrs & Harrison Co. v. Fusselman*, 293; *Franklin Ins. Co. v. Wolff*, 549.

DESCENT AND DISTRIBUTION—As to right of widow to rents accruing after husband's death, see **LANDLORD AND TENANT**, 8; *Murray v. Cazier*, 600.

Rents coming due after the landlord's death go to the heir as an incident of the reversion, see **LANDLORD AND TENANT**, 1; *Ib.*

DISMISSAL AND NONSUIT—By withdrawal of juror, see **CONTINUANCE**; *Wabash R. Co. v. McCormick*, 258.

DRAINS—

Assessments For Repair Do Not Bear Interest.—Assessments against lands, under §5631 Burns 1894, for the repair of a ditch do not bear interest as do judgments for the recovery of money. *Morrow v. Geeting*, 494.

ELECTION OF REMEDIES—

Contract.—Tort.—Where there is no legal duty except that arising from a contract, there cannot be an election between an action on contract and one in tort. *Parrill v. Cleveland, etc., R. Co.*, 638.

EMPLOYERS' LIABILITY ACT—As to liability of corporation for personal injuries, under §7083 Burns 1894, see **MASTER AND SERVANT**, 10, 11, 12; *Indianapolis Gas Co. v. Shumack*, 87.

ESTOPPEL—When corporation that has become surety on a contractor's bond is estopped to plead *ultra vires* to its liability on the bond, see **PRINCIPAL AND SURETY**, 5; *Wittmer Lumber Co. v. Rice*, 586.

Attorney and Client.—A judgment creditor will not be estopped from maintaining an action for the enforcement of a judgment by the fact that she did not disavow a settlement made by her attorney, by reason of which a proposed appeal from the judgment was abandoned, where it is not shown that plaintiff knew all of the facts concerning the settlement and proposed appeal, or that she kept silent for the purpose of inducing the judgment debtor to abandon the appeal. *City of Hammond v. Evans*, 501.

EVIDENCE—

1. *Admissions in Pleadings Filed in Another Action*.—Admissions made by defendant in the pleadings filed in another action cannot be proved by parol, since the record is the best evidence. *Colborn v. Fry*, 485.
2. *Admissions.—Attorney's Fees.—Bills and Notes.—Instruction*.—An instruction in an action on a promissory note, fixing the amount for which the verdict should be returned and including in the amount attorney's fees, was erroneous, where plaintiff offered to prove the attorney's fees, and defendant stated that "the usual attorney's fee under the rule is admitted by defendant," and no further reference was made to the subject. *Warren v. Syfers*, 167.
3. *Self-Dis-serving Declarations by Attachment Defendant*.—Statements made by the attachment defendant after the garnishee has been served are not admissible, as self-dis-serving declarations, against the attachment plaintiff and in favor of the garnishee. *Phenix Ins. Co. v. Jacobs*, 509.
4. *Writings.—Intention*.—It is error to permit a party to testify as to what his intention was in delivering a letter. *Colborn v. Fry*, 485.
5. *Copy of Letter*.—The introduction in evidence of a copy of a letter is not available error, where, afterwards, in connection with the testimony of the witness the original letter was introduced. *Phenix Ins. Co. v. Jacobs*, 509.
6. *Telegram.—Agency*.—Where the fact of agency is otherwise proved, it is not error to admit in evidence a telegram pertaining to the business of the agency, upon the ground that the telegram is a paper prepared by the agent to prove his agency. *Ib.*
7. *Insurance.—Oral Contract*.—In an action against an insurance company for a loss by fire, under a contract entered into with defendant's agent to insure the property for the same amount, and upon the same terms as a former policy issued by defendant upon the property, the former policy is admissible in evidence. *Western Assurance Co. v. McAlpin*, 220.
8. *Insurance.—Ownership of Insured Property*.—In an action for a loss under a contract of insurance, evidence by a witness who had formerly owned an interest in the insured property, that she had no interest therein when it was burned, was harmless, where there was other undisputed evidence showing the ownership of the property. *Ib.*

EVIDENCE—Continued.

9. *Conclusion.—Bills and Notes.*—In an action on a promissory note it was error for the court to permit plaintiff to testify that he bought the note in good faith, as the question of good faith was one to be decided by the jury upon all the facts.

Pope v. Branch, etc., Bank, 210.

10. *Bills and Notes.*—Where in an action on a promissory note the question was raised as to plaintiff's knowledge at the time of the purchase of the note that it was given for a patent right, no error was committed in permitting plaintiff to relate a conversation had with the payee of the note after he had purchased it, in which he was first informed that it was given for a patent right.

Pape v. Hartwig, 333.

11. *Partnership.*—In the trial of an action on a promissory note brought by the administrator of a deceased partner against a surviving partner, a statement made by experts, containing receipts, drafts, etc., pertaining to the partnership accounts, shown to have been taken from entries on the books made by defendant, after the death of decedent, on the information of the defendant that he had paid them, is not admissible in evidence.

Beckett v. Little, Adm., 65.

12. *Railroads. — Fires.*—Evidence that sparks of fire and live cinders were thrown upon the roof of a building by a passing engine a short time before the fire was discovered, that there were no indications of fire before the engine passed, and that within a few minutes after the engine passed fire was discovered in that part of the building where the sparks were seen to fall, furnishes a sufficient basis from which the jury could infer that the fire originated from such sparks and cinders.

McDoel, Rec., v. Gill, 95.

13. *Natural Gas.—Negligence of Company.*—In an action against a natural gas company for damage to property by fire caused by an overheated stove on account of the alleged negligence of defendant in failing properly to regulate the supply of gas, proof that on the night of the fire other consumers noticed that their stoves were overheated was improperly admitted, where it was shown that the mixers furnished consumers were of different sizes, some admitting more gas than others, and that there was a key under the control of each consumer with which he could regulate the flow of gas into his stove and turn it off entirely.

Indiana, etc., Gas Co. v. New Hampshire Ins. Co., 298.

14. *In Support of Bad Answer.*—Error cannot be predicated upon the action of the court in excluding evidence offered in support of a bad paragraph of answer.

Beckett v. Little, Adm., 65.

15. *Harmless Error.—Replevin.*—Alleged error in the admission of evidence in the trial of an action on a replevin bond, as to the value of a horse which had died after the execution of the bond, was harmless, where there was nothing in the judgment to indicate that the court considered the value of the horse in arriving at the amount of the judgment.

Kahn v. Gavit, 274.

16. *Deceased Witness.*—The testimony of a deceased witness may be read as evidence in a subsequent trial.

Western Assurance Co. v. McAlpin, 220.

17. *Cross-Examination of Witness.*—No error was committed in sustaining an objection to a question asked plaintiff on cross-examination, if he would not accept the amount of his demand in settlement of his claim if he could get it.

Pennsylvania Co. v. Hunsley, 37.

18. *Cross-Examination of Witness.*—Where, in the trial of an action against a railroad company for damages on account of fire

EVIDENCE—Continued.

escaping from defendant's right of way, the plaintiff stated on cross-examination that he had another suit pending with his brother against defendant for the same fire, it was proper to ask him the amount of his claim in that case. *Ib.*

19. *Cross-Examination of Witness.*—Where a witness admitted on cross-examination that he wanted plaintiff to recover, no error was committed in excluding questions asked him as to whether he wanted other parties, in similar actions against defendant, to recover. *Ib.*

20. *Medical Services. — Action by Husband for Personal Injury of Wife.*—In the trial of an action for damages on account of personal injuries to plaintiff's wife, the court erred in admitting the testimony of a physician as to the amount of his bill for treating her for such injury, without showing the reasonable value of such services. *City of Bedford v. Woody, 401.*

21. *Opinion Evidence.*—A witness, who was shown to be a farmer residing in the same county in which plaintiff's land alleged to have been damaged by fire was situated, had passed and repassed the land for about five years, and had been over the land after the fire, was competent to testify as to the value of the land before and after the fire. *Pennsylvania Co. v. Hunsley, 37.*

22. *Depositions. — Opinion Evidence.*—Where, in the trial of an action against a railroad company for damages to plaintiff's land caused by fire escaping from defendant's right of way, the plaintiff offered in evidence certain depositions in which the deponents stated that they owned muck land, similar to plaintiff's, that they had fires on such land, and that fires were a benefit, and not a detriment, the action of the court in refusing to admit the depositions in evidence, on the ground that it was not shown that deponents had seen plaintiff's land, was error. *Ib.*

23. *Rebuttal.*—No error was committed in permitting articles of association, duly signed and acknowledged, but not recorded in the county, as required by law, to be admitted in evidence for the purpose of rebutting the charge of bad faith in failing to incorporate the company. *Warren v. Syfers, 167.*

24. *Agreed Statement of Facts.—Appeal and Error.*—A statement of the evidence agreed upon by the parties will not be treated on appeal as a statement of facts in a special finding, but will be regarded as the evidence introduced upon the trial. *West, Tr., v. Graff, 410.*

25. *Objections Not Raised in Trial Court.*—Objections to evidence not raised in the trial court will not be considered on appeal. *Phenix Ins. Co. v. Jacobs, 509.*

26. *Exception.*—An objection to the admission of evidence on the ground that it was immaterial and irrelevant is not sufficient to raise any question as to its competency or admissibility. *Western Assurance Co. v. McAlpin, 220.*

EXECUTORS AND ADMINISTRATORS—See DECEDENTS' ESTATES.

1. *Liability of Estate for Acts of Executor Prior to His Qualification.—Attorney's Fees.*—An attorney at law who renders services to one named in a will as executor prior to his qualification as such, by the giving of legal advice in reference to certain of his rights and duties in connection with the trust, and in assisting in procuring

EXECUTORS AND ADMINISTRATORS - Continued.

the bond required of such executor, is entitled to collect his fees for such services as other claims against the estate would be collected. *Baker v. Cauthorn*, 611.

2. *Decedents' Estates.—Final Report.—Collateral Attack.*—The approval by the court of the final report of the administrator, and his discharge, duly entered of record in the proper order-book, has the force and effect of a final judgment, and cannot be collaterally attacked unless the adjudication was without notice.

State ex rel. v. Burkam, 271.

3. *Guardian and Ward.—Administrator as Guardian.*—A guardian who is the administrator of an estate cannot represent the interest of his ward in such estate, and a judgment approving the final report of an administrator who as guardian receipted for his ward's interest in the estate, without notice, or the appointment of a guardian *ad litem*, is void as to such ward. *Ib.*

FRAUD—See STATUTE OF FRAUDS.

A statement made by vendor to vendee as to balance due on a building and loan mortgage was not an opinion, but a statement of fact on which vendee had a right to rely. See **VENDOR AND PURCHASER**, 1; *Loucks v. Taylor*, 245.

Where a vendee could not read, was inexperienced in business, but had confidence in vendor, the failure of vendor to read a certain clause in the deed of conveyance whereby plaintiff assumed certain mortgages was a fraud on vendee. See **VENDOR AND PURCHASER**, 2; *Ib.*

1. *Preferring Creditors.*—The preference of particular creditors by paying or securing their claims in full or in unequal ratio, is not in itself fraudulent or void, but is permissible, when not made in a general assignment under the statute. *West, Tr., v. Graff*, 410.
2. *Evidence.—Presumption of Good Faith.*—In an action to recover personal property alleged to have been procured by the defendant through fraud, where the facts relied on to show fraud are consistent with either good or bad faith, the presumption of good faith will prevail. *Roehm v. Reed*, 547.
3. *Sales.*—The fact that the purchaser of goods was insolvent when the goods were sold and delivered, and knew of his inability to pay all of his debts, and that he mortgaged the goods purchased, and others, constituting his stock of merchandise on hand, to a trustee to pay certain *bona fide* debts, giving greater preference to some creditors than others, will not alone warrant a conclusion that the purchase was fraudulent. *West, Tr., v. Graff*, 410.

GAS—See NATURAL GAS.**GARNISHMENT—**

Release of One Garnishee Defendant.—A release of one garnishee, by attachment plaintiffs, while retaining all their rights against other garnishees, will not affect the other garnishees, indebted to the attachment defendant, and not to the garnishee released.

Phenix Ins. Co. v. Jacobs, 509.

GUARANTY—A salesman's bond to his employer is a contract of suretyship and not a collateral guaranty. See **PRINCIPAL AND SURETY**, 1; *Durand & Kasper Co. v. Rockwell*, 11.

GUARANTY—Continued.

Where a lumber company signs a bond with a contractor to secure the performance of a contract in the construction of a building, the lumber company is not a collateral guarantor. See **PRINCIPAL AND SURETY**, 4; *Wittmer Lumber Co. v. Rice*, 586.

1. *Bills and Notes.—Complaint.*—In an action on a written undertaking guaranteeing the payment of a note, an allegation that "defendants have failed and refused to keep and comply with their part of said contract and to pay to said plaintiff said sum of \$1,000, and that said sum is now due, it being due on said note, and remaining wholly unpaid," is a sufficient averment that the note guaranteed is unpaid to the amount of \$1,000.

Hernley v. Brannum, 388.

2. *Bills and Notes.—Complaint.*—A complaint on a contract in the words "we, the undersigned, * * do hereby guarantee that a certain note, made and executed by P, for the sum of \$1,000, payable to the order of H, on the 14th day of February, 1894, will be paid," is sufficient without averring diligence to enforce collection from the maker.

Ib.

GUARDIAN AND WARD—A guardian who is the administrator of an estate cannot represent his ward in such estate. See **EXECUTORS AND ADMINISTRATORS**, 3; *State, ex rel. v. Burkam*, 271.

HARMLESS ERROR—See **APPEAL AND ERROR; PRACTICE**.

The overruling of a demurrer to a pleading is not material where the facts necessary to a recovery are found in the special finding of facts. See **PRACTICE**, 1; *Lewis v. Albertson*, 147.

It is harmless to overrule a demurrer to a bad reply, where the answer to which it was addressed was also bad. See **PLEADING**, 23; *Beckett v. Little, Adm.*, 65.

Admission of Evidence.—Intention of Party in Delivery of a Letter.—Error in permitting a party to testify as to what his intention was in delivering a letter is harmless, where the testimony did not tend to change the plain meaning of the words used in the letter.

Colborn v. Fry, 486.

HUSBAND AND WIFE—

1. *Separation and Separate Maintenance.—Contracts.*—A contract entered into by husband and wife, who were living apart by mutual consent, providing a specific sum, payable monthly, for the support of the wife, is without consideration, and cannot be enforced.

Scherer v. Scherer, 384.

2. *Action for Support.—Excessive Judgments.*—A judgment for \$200 in an action by a wife against her husband for the support of herself and child will not be held to be excessive where the evidence showed that the husband was steadily employed at \$40 a month, and had in cash and at interest \$1,100.

Brackett v. Brackett, 530.

3. *Lease.—Presumption.*—Where a wife joins with her husband in a lease, it will be presumed, in the absence of a special agreement to the contrary, that the inducement for the release of her inchoate interest, as to the grantee, was the consideration paid to her husband.

Murray v. Cazier, 600.

INDICTMENT—Against county commissioners for allowing illegal claim, see **COUNTY COMMISSIONERS**, 1, 2; *State v. Trueblood*, 31; *State v. Robertson*, 424.

INSTRUCTIONS—As to amount of attorney's fees recoverable in action on promissory note, see EVIDENCE, 2; *Warren v. Syfers*, 167.

As to character of relatrix in bastardy proceeding, see BASTARDS; *Rinehart v. State, ex rel.*, 419.

When not properly in the record, see APPEAL AND ERROR, 10, 11, 12, 14; *Hall v. State, ex rel.*, 521; *Week v. Widgeon*, 405.

1. *Modification.—Practice.*—Requested instructions may be modified by the court, and made applicable to the evidence.

Citizens, etc., R. Co. v. Hoffbauer, 614.

2. *Modification.—Practice.—Street Railroads.*—In an action against a street railway company for injury to a passenger while standing on the running-board of the car, an instruction requested by the defendant to the effect that if the passenger did certain things he was guilty of contributory negligence and could not recover was properly modified so as to define the general use of the running-board, where there was evidence showing the general use of the running-board by passengers. *Ib.*

3. *Must Be Considered as a Whole.*—An instruction will not be considered in detached portions.

Indianapolis Gas Co. v. Shumack, 87.

4. *Harmless Error.*—A judgment will not be reversed because one or more instructions given, when standing alone, were erroneous, where, construing all the instructions together, it is apparent that the jury was not misled, and it affirmatively appears that the verdict was right upon the evidence.

Archibald v. Harvey, 30; *Miller v. Stevens*, 365.

5. *Refusal to Give.*—No error was committed in refusing an instruction when the substance of it had been given in another instruction.

Rinehart v. State, ex rel., 419.

6. *Evidence.*—An objection to an instruction as not being applicable to the evidence is not available where there was some evidence on the question to which it was directed. *State, ex rel., v. Carey*, 378.

7. *Evidence.*—An instruction in the trial of an action against a street railway company which assumed that the car was running backward at the time of plaintiff's injury was properly refused where the undisputed evidence showed that the car was running forward at the time of the injury. *Citizens, etc., R. Co. v. Hoffbauer*, 614.

8. *Abstract Propositions of Law.—Remedy.*—Available error cannot be predicated upon the action of the court in giving an instruction which was correct as an abstract proposition of law. The remedy in such cases is to request further instructions upon the proposition.

Pope v. Branch, etc., Bank, 210.

9. *Misstatement of Pleadings.—Harmless Error.—Replevin.*—A statement in an instruction in an action in replevin, that plaintiff avers that defendant obtained possession of the property unlawfully, when no such allegation was made, is harmless, where other instructions informed the jury that it was only necessary for plaintiff to prove ownership and right of possession in the property at the time the action was commenced. *Archibald v. Harvey*, 30.

10. *Invading Province of Jury.*—An instruction in the trial of an action for personal injuries that if the jury found for plaintiff they might take into consideration the nature of his injuries, any physical or mental pain which he has suffered, as shown by the evidence, also any expense incurred for medical attendance, and any loss of time, loss of wages or employment, and give him such damages as

INSTRUCTIONS--Continued.

will compensate him for the injuries he has sustained, not exceeding the amount named in the complaint, is not objectionable as assuming the truth of facts in issue.

Citizens, etc., R. Co. v. Hoffbauer, 614.

11. *Invasion of Province of Jury.—Preponderance of Evidence.—Intelligence of Witness.*—An instruction that "The preponderance of evidence in this case does not depend alone on the number of witnesses who testified for or against the existence of any particular fact or state of facts. In determining upon which side lies the preponderance of evidence, you should take into consideration the intelligence and candor of the several witnesses," etc., is an invasion of the province of the jury.

Pennsylvania Co. v. Hunsley, 37.

12. *Invading Province of Jury.—Street Railroads.*—An instruction in an action against a street railway company for personal injury to a passenger while on the running-board of the car, that if defendant was running the car in question so that the running-board was on the side next to the trolley poles, and that defendant was running the car without giving any warning to passengers of danger from the trolley poles, that such acts would constitute negligence, was erroneous, and an invasion of the province of the jury.

Citizens, etc., R. Co. v. Hoffbauer, 614.

13. *Railroads.—Fires Escaping from Right of Way.—Measure of Damages.*—An instruction in the trial of an action against a railroad company for damages caused by fire escaping from its right of way, that "in determining the amount of damages, if any, sustained by the plaintiff, you should be guided by the evidence introduced, and may take into consideration the opinions of the many witnesses as to the value of the land," is not erroneous when considered in connection with another instruction previously given informing the jury that the measure of the damages was the diminution of the market value of the land occasioned by the fire.

Pennsylvania Co. v. Hunsley, 37.

14. *Bastardy Prosecution.—Credibility of Relatrix as a Witness.*—No error was committed in instructing the jury in a bastardy prosecution that in determining the credibility of the prosecuting witness the jury might take into consideration her interest in the result of the suit, but the fact that she was the prosecuting witness would not permit them to give her evidence any less or greater weight than if they were considering her evidence in a case of another kind in which she might be interested.

State, ex rel., v. Carey, 378.

15. *Bills and Notes.*—Where the words "given for a patent right" were omitted from a promissory note, the action of the court in misquoting the statute as to whose duty it was to insert such words in a note given for a patent right in an instruction in the trial of an action on the note by a purchaser thereof was harmless error, since the motives of the seller or maker of commercial paper have no place in determining the rights of the buyer.

Pape v. Hartwig, 333.

16. *Pleading—Partnership.*—Where in an action on a promissory note by the administrator of a deceased partner against a surviving partner defendant pleaded as a set-off certain sums of money paid by him individually in settlement of the partnership accounts without raising the question of the solvency of the partnership, no error was committed in instructing the jury that they

INSTRUCTIONS—Continued.

had nothing to do with the question of the solvency of the partnership, or as to whether the defendant would have to pay the partnership claims from his individual funds on final settlement of the partnership accounts. *Beckett v. Little, Adm., 65.*

INSURANCE—See ACCIDENT INSURANCE.

As to sufficiency of process in action against an insurance company, see **PROCESS**; *Fort Wayne Ins. Co. v. Irwin, 53.*

Sufficiency of complaint in action on fire policy, see **PLEADING, 5; Ib.**

1. *Principal and Agent.—Premium.*—An agent authorized to accept risks and collect premiums, having the power to make a valid contract to insure, may waive the payment of premium in cash. *Western Assurance Co. v. McAlpin, 220.*
2. *Complaint.—Payment of Premium.*—In an action on an oral contract of insurance it is not necessary to allege and prove payment of the premium. *Ib.*
3. *Crediting Premium on Agent's Account.*—Where an insurance agent entered into a contract to insure plaintiff's property, crediting the premium on an account which the agent owed to plaintiff, the contract is binding on the company. *Ib.*
4. *Premium.—Payment. — Evidence.* — Where parties contract for insurance with reference to former dealings in which a credit was given for premiums, such dealings may be looked to in determining whether a cash payment or a credit was intended. *Ib.*
5. *Proof of Loss.—Action.*—Where a fire insurance policy requires that proof of loss shall be made by the insured within a given time, and the insured makes the proof of loss required, and no objection is made thereto within the time stipulated, and the loss is not paid, so far as ascertaining the amount of loss is concerned, a right of action accrues on the policy. *Fort Wayne Ins. Co. v. Irwin, 53.*
6. *Proofs of Loss.—Waiver.*—Where an insurance company is dissatisfied with the proofs of loss furnished, it should make the fact known to the insured without unnecessary delay, and specify its objections so that they may be corrected; and a failure in this respect amounts to a waiver of further proofs. *Ib.*
7. *Proofs of Loss.—Waiver.*—Where an insurance company, after a loss, refused to issue a policy upon an oral agreement entered into by its agent to insure the property, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit. *Western Assurance Co. v. McAlpin, 220.*
8. *Instructions.—Waiver.*—Where in an action on a fire insurance policy the issue of waiver was not presented by the pleadings, it was error for the court to instruct the jury that plaintiff must either show a performance of the conditions of the contract on his part to be performed, or show that defendant had waived the performance of such conditions. *Fort Wayne Ins. Co. v. Irwin, 53.*
9. *Proof of Loss.—Waiver.*—Where specific objections are made by an insurance company to proofs of loss furnished it by insured, any other objections, which, if made, could have been readily met, are waived. *Ib.*
10. *Suit on Oral Contract.—Damages.*—A court of equity will enforce an oral contract for a policy of fire insurance, and having jurisdiction for specific enforcement, adjudge the damages the same as if the policy had been issued and suit brought thereon, *Western Assurance Co. v. McAlpin, 220.*

INSURANCE—Continued.

11. *Suit upon Oral Contract.—Pleading.*—In a suit against an insurance company for a fire loss, upon an oral contract to insure the property, the policy agreed to be issued is not the foundation of the action in the sense that it must be filed with the complaint. *Ib.*
12. *Complaint.—Ownership of Property.*—A complaint in an action on a fire insurance policy must allege that plaintiff was the owner of the property at the time it was destroyed.
Farmers Ins. Co. v. Burris, 507.
13. *Complaint.—Ownership of Property.*—A complaint in an action on a fire insurance policy alleging that plaintiff was the owner of the property at the date of the policy, that the dwelling-house and contents, except certain enumerated articles, were entirely destroyed, and that "plaintiff suffered a total loss, all to his damage, in the sum of \$500," does not sufficiently aver that plaintiff was the owner of the property at the time it was destroyed. *Ib.*
14. *Assignment of Void Fire Policy.—Rights of Assignee.*—The rule of law that the assignment of a fire policy by consent of the insurer makes a new contract, and that defenses available against the assignor cannot be pleaded against the assignee is not applicable to a policy void in its inception. *Franklin Ins. Co. v. Wolff, 549.*
15. *Rights of Mortgagee to Whom Insurance is Payable.*—A mortgagee to whom a loss is payable as his interest may appear is not an assignee of the policy in the sense that a new contract of indemnity is created with the insurer. Such mortgagee is therefore bound by a clause in the policy prohibiting other insurance of the property by the insured. *Ib.*
16. *Action by Mortgagee on Fire Policy.—Pleading.*—A mortgagee to whom a fire policy is payable may, where the mortgage debt exceeds the amount of the policy, prosecute an action on the policy in his own name, if the insured is made a party defendant. *Ib.*
17. *Beneficial Associations.—Collection of Assessments.*—An assessment insurance company cannot collect an assessment from one who has accepted a policy and ceased paying thereon, since the contract is unilateral, and the only penalty which follows a refusal to pay is the loss of the policy-holder's rights thereunder.
Clark, Rec., v. Schromeyer, 565.
18. *Warranties.—Breach.—Pleading.—Waiver.*—Defendant filed answer seeking to avoid the payment of an insurance policy because of certain false representations made by the assured as to the condition of his health, and the breach of a promise contained in the application to abstain from the excessive use of intoxicating liquors. Plaintiff replied that defendant issued the policy and accepted premiums thereon with full knowledge that the answers in question were false. *Held*, that the reply was demurrable, since it should have averred that defendant had notice of the violation of the agreement not to use intoxicating liquors to excess, and, with such notice, accepted payment of premiums.
Northwestern, etc., Assn. v. Bodurtha, Gdn., 121.
19. *Forfeiture.—Waiver by Agent.*—Where the agent of an insurance company, authorized to solicit applications and collect premiums, continued to collect premiums from assured with knowledge of the fact that he was using intoxicating liquors to excess, in violation of the policy, such action amounted to a waiver of the right to declare a forfeiture, although such knowledge was not communicated to the company. *Ib.*

INSURANCE—Continued.

20. *Forfeiture.—Pleading.*—An answer seeking to avoid the payment of a policy of insurance because of false statements made by assured in his application in regard to his health, need not show that the company was imposed upon by the false statements, or that it believed the statements were true, where the policy which was made part of the answer stated that it was issued in consideration of the representations, agreements and warranties made in the application. *Ib.*
21. *Policy.—Warranty.—Use of Intoxicating Liquor to Excess.*—An application for insurance containing questions and answers, the medical examiner's report and an agreement reciting that "the preceding statements and answers, and the application and this agreement are made part of the policy" form part of the insurance contract, and an agreement therein that the insured would abstain from the excessive use of intoxicating liquor, was a promissory warranty, and not the statement of an expectation. *Ib.*
22. *Warranty.—Forfeitures. — Use of Intoxicating Liquor to Excess.*—The fact that an insurance company knew that assured was in the habit of drinking intoxicating liquor to excess prior to the issuance of the policy will not prevent the company from avoiding payment on account of a breach of a promissory warranty not to drink intoxicating liquor to excess. *Ib.*

INTERROGATORIES TO JURY—See VERDICT.

1. *Practice.*—Each interrogatory propounded to the jury must present a single material fact involved in the issue. *Pope v. Branch, etc., Bank, 210.*
2. *Railroads.—Damages.—Fires Escaping from Right of Way.*—In an action against a railroad company for damages caused by fire escaping from its right of way, the condition of the right of way was a material fact in the case, and an interrogatory to the jury, asking if there was not a short growth of grass at a certain place on the right of way which was not burned over by the fire, should have been submitted. *Pennsylvania Co. v. Hunsley, 57.*

INTOXICATING LIQUORS —

Saloon.—Occupants During Unlawful Hours.—Former Acquittal.—A saloon-keeper who permits two or more persons to enter his saloon during prohibited hours cannot be prosecuted for a separate offense as to each of such persons under §5323c Horner 1897 making it unlawful for the proprietor of such place to permit "any person or persons other than himself and family to go into such room" during prohibited hours. *State v. Rosenbaum, 236.*

JUDGES—Waiver of objection to appointment of special judge, see **COURTS**, 8, 4; *Lewis v. Albertson, 147.*

Special Judge.—Appointment.—When Need Not Be in Writing.—When the person called to try the cause on change of venue is a duly qualified and elected judge of another circuit, a written appointment is not necessary. *Ib.*

JUDGMENTS—As to pleadings in action for review, see **PLEADING**, 21; *Springfield, etc., Co. v. Michener, 130.*

Sufficiency of complaint in action to enforce a judgment, see **PLEADING**, 6, 8; *City of Hammond v. Evans, 501.*

JUDGMENTS—Continued.

Where a complaint in two paragraphs alleges two causes of action, the fact that the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other. See PLEADING, 7; *Chicago, etc., R. Co. v. Spencer*, 605.

1. *Review*.—In an action to review a judgment on account of new matter discovered after the rendition thereof, it appeared by the special findings that plaintiff, as agent for defendant, sold a threshing machine, and indorsed the notes taken in payment therefor, it being understood by the parties at the time that plaintiff was to guarantee the payment of all notes where the makers had no defense to the same. Defendant brought suit on the notes, and plaintiff, having no notice or knowledge that the makers had any defense thereto, suffered himself to be defaulted, and the makers were released by the subsequent judgment of the court in the same action. *Held*, that plaintiff was entitled to have the judgment against him reviewed. *Springfield, etc., Co. v. Michener*, 130.
2. *Motion to Correct*.—*Review on Appeal*.—The action of the trial court in overruling a motion to strike out part of a judgment is not reviewable on appeal. *Morrow v. Geeting*, 424.
3. *Correction*.—*Pleading*.—*Motion*.—A motion directing the court's attention to the specific record in which a judgment was rendered, to the parts sought to be stricken out, and assigning reasons therefor, is sufficient to correct a judgment rendered by such court at a previous term. *Id.*
4. *Execution* — *Stay*.—*Garnishment*.—*Collusion*.—Where defendant, for the purpose of delaying the collection of a note sued upon, caused an action in attachment and garnishment to be instituted against the payee of the note in which defendant was joined as a garnishee, he is not entitled to a stay of execution, without bail, on the judgment to the extent of the amount claimed in the garnishee proceeding. *Nevian v. Poschinger*, 695.
5. *Appeal*.—The holder of a judgment may bring suit for its enforcement pending an appeal. *City of Hammond v. Evans*, 501.

JUDICIAL NOTICE—

Incorporation of Cities.—Courts take judicial notice of the incorporation of cities in this State. *City of Bedford v. Woody*, 231.

JURISDICTION—As to how objection that action was brought in wrong county is raised, see PLEADING, 18; *Fort Wayne Ins. Co. v. Irwin*, 53.

JUSTICES OF THE PEACE—

Appeal Bond.—*Dismissal of Appeal*.—*Action on Bond*.—Where an appeal taken from a justice of the peace to the circuit court was dismissed by the appellant, the sureties on the appeal bond are liable in an action thereon, although the complaint shows affirmatively that the justice of the peace had no jurisdiction of the subject-matter of the original action. *Bernhamer v. Hoffman*, 34.

LANDLORD AND TENANT—Where an employe has the use and occupancy of a farmhouse and garden of his employer as part remuneration for his services on the farm, his possession is that of his employer. See MASTER AND SERVANT, 8; *Fulton v. Heffelfinger*, 104.

LANDLORD AND TENANT—Continued.

1. *Rents.—Descent.*—Rents coming due after the landlord's death go to the heir as an incident of the reversion.
Murray v. Cazier, 600.
2. *Lease.—Rents Accruing After Lessor's Death.*—A provision in a lease by a husband, that rents accruing after his death shall be paid to his widow, is invalid, as an attempted testamentary devise.
Ib.
3. *Lease.—Rights of Widow as to Rents Accruing After Husband's Death.*—A widow, as the survivor of her husband, cannot maintain an action on a lease for rents accruing after her husband's death, although she may have joined with her husband in the execution of the lease.
Ib.

LAW OF CASE—

Subsequent Appeal.—Where it is held on appeal that a party cannot recover on the facts disclosed, such decision is binding on a subsequent appeal if the facts remain the same; but if the facts are different, and warrant a different conclusion, the former decision is not conclusive on the subsequent appeal.

City of Bluffton v. McAfee, 112.

LIBEL—

1. *Privileged Communication —Notice.—Complaint.—Evidence.*—In an action for libel, based upon a privileged communication, the burden is upon plaintiff to allege and prove that the publication was malicious and without probable cause.
Henry v. Moberly, 305.
2. *Malice. — Evidence. — Privileged Communication.*—Where an action for libel is based upon a privileged communication, proof of the falsity of the charge made in the communication is not of itself sufficient to show malice.
Ib.
3. *Privileged Communication. — Falsity of Charge.*—To entitle plaintiff to recover in an action for libel, based upon charges made in a privileged communication, it must be shown that the charges were false, and that defendant knew them to be false at the time he made them.
Ib.
4. *Damages.*—Where, in an action for libel, based upon a communication made by a school trustee to his associates protesting against the employment of plaintiff as teacher, it was shown that plaintiff was employed, notwithstanding such protest, and without any financial loss, and that the charges were not communicated to any other persons, she was not entitled to more than nominal damages.
Ib.

LIFE INSURANCE—See INSURANCE.**MASTER AND SERVANT—See NEGLIGENCE.**

Action by servant for labor performed under contract of hire, see **CONTRACTS, 4, 5; Fulton v. Heffelfinger, 104.**

1. *Negligence.—Complaint.*—A complaint alleging that plaintiff was employed by defendant to perform a certain service which was unattended by danger, and that while so employed he was ordered by defendant to perform another and different service, in which he was inexperienced, which was attended by great peril, and that defendant carelessly and negligently failed to instruct him or warn him of such danger, and that such danger was not apparent to an inexperienced person, states a cause of action, and does not show that the servant assumed the risk incident to the employment.
Consolidated Stone Co. v. Redmon, 319.

MASTER AND SERVANT—Continued

2. *Defective Machinery.—Knowledge of Danger.*—A manufacturing company is not chargeable with actionable negligence on account of its failure to place guards over the revolving knives of a wood jointing machine in order to protect the operator, where the danger was open and obvious. *Guedelhofer v. Ernsting, 188.*
3. *Notice of Danger.*—Negligence cannot be based upon the failure of an employer to warn an operator of a wood jointing machine of the increased danger incident to planing a small stick of timber. *Ib.*
4. *Defective Machinery.—Knowledge of Danger.—Complaint.*—In an action by a servant against the master for damages for personal injuries sustained on account of defective machinery, it is not sufficient to allege freedom from fault, but he must show that he had no knowledge of the danger, or, having knowledge, he must show an excuse for continuing in the work at which he was injured. *Daugherty v. Midland Steel Co., 78.*
5. *Defective Machinery.—Knowledge of Danger.—Promise to Repair.—Time in which to Make Repairs.—Complaint.*—In an action by a servant for injuries sustained on account of defective machinery, pending a promise of the master to repair the same, the complaint need not allege that an unreasonable time had not elapsed for the fulfilment of the promise. *Ib.*
6. *Defective Machinery.—Knowledge of Danger.—Promise to Repair.*—The question whether a servant continued to work for an unreasonable time with defective machinery after a promise by the master to make repairs must vary according to the circumstances of the case, and is a question of fact for the jury. *Ib.*
7. *Defective Machinery.—Knowledge of Danger.—Promise to Repair.—Complaint.*—Where a complaint in an action by a servant for injuries sustained on account of defective machinery alleged that the servant complained of the defects and the master promised to remedy them, and that the servant, relying upon such promise, continued in the service and was injured within six days after the promise was made, an allegation that a sufficient time had elapsed for the fulfilment of the promise when the injury occurred does not vitiate the complaint. *Ib.*
8. *Possession of Farmhouse.*—Where an employe has the use and occupancy of the farmhouse and garden of his employer as part remuneration for his services on the farm, his possession is that of his employer, and not an independent one. *Fulton v. Heffelfinger, 104.*
9. *Personal Injuries.—Employer's Liability Act.—Corporations.*—Plaintiff, while in the employ of defendant gas company, under the direction of the superintendent, went into a trench to repair a leak in the gas-main. The superintendent approached with a lighted lantern and the escaping gas ignited, causing an explosion, injuring plaintiff. *Held*, that the action of the superintendent in approaching the trench with a lighted lantern was the proximate cause of the injury, and that defendant was liable therefor under the provisions of the employer's liability act, §7083 Burns 1894. *Indianapolis Gas Co. v. Shumack, 87.*
10. *Personal Injuries.—Employer's Liability Act.—Corporations.*—In order that there may be a recovery under subdivision two, section one of the employer's liability act, §7083 Burns 1894, it must appear that the person whose negligence caused the injury was in

MASTER AND SERVANT—Continued.

the service of the corporation; that the employe injured was, at the time of the injury, bound to conform to the orders of such person; and that the injured employe, himself without fault, was, when injured, complying with such orders. *Ib.*

11. *Employer's Liability Act.—Corporations.*—The second subdivision of the employer's liability act (§7083 Burns 1894), making a corporation liable for injuries to an employe resulting from the negligence of any person in the service of such corporation to whose orders or directions the injured employe at the time of the injury was bound to conform, and did conform, is not nullified by the provision of subdivision four of the same section, limiting the liability of such corporation to instances where the person causing the injury was performing the duty of the corporation in that behalf, since each subdivision specifies different employes. *Ib.*

MECHANICS' LIENS—

1. *Foreclosure.—Parties.*—Section 5299 Horner 1897, relative to the foreclosure of mechanics' liens, does not authorize a joinder of plaintiffs whose claims and interests are several, but since the statute authorizes the consolidation of such actions by the court, available error cannot be predicated upon the action of the court in overruling a demurrer to a complaint in which several mechanics and material men joined, where the claims were stated severally, and the finding and judgment were several as to each claimant. *Northwestern, etc., Assn. v. McPherson, 250.*
2. *Failure to Record Notice of Lien.—Intervening Mortgage.*—Where notice of intention to hold a lien is filed by a mechanic or material man as provided by law, the failure of the recorder to record it in the miscellaneous record, as required by §5296 Horner 1897, will not defeat the priority of the lien as against the holder of an intervening mortgage. *Ib.*
3. *Mortgages.—Priority.*—Mechanics' liens relate back to the time when the work was commenced, or the materials were begun to be furnished, and a mortgage does not gain priority over a lien by reason of the fact that it was executed and recorded prior to the filing of the notice of the mechanic's lien. *Ib.*
4. *Complaint.—Special Finding.—Description of Real Estate.—Variance.*—A complaint in an action to foreclose a mechanic's lien described the lots as 94 and 95 in the town of Kewanna, and the findings showed that the materials were furnished for and the work done on buildings erected on lots 94 and 95 in A. D. Toner's addition to the town of Kewanna. *Held*, not to constitute a fatal variance, since the complaint could have been amended to show that there were no lots in the town with duplicate numbers. *Ib.*
5. *Notice.—Lien on Two Lots.*—Where material was furnished and labor performed in the construction of a house and barn, the barn being constructed on a lot adjoining that on which the house stood, both lots belonging to the same person, in the same inclosure, and used together as constituting the home residence of the owner, a single notice of a mechanic's lien against the two lots was sufficient. *Ib.*

MENTAL ANGUISH—As to recovery of damages for mental suffering caused by the failure of a telegraph company to transmit message, see TELEGRAPH COMPANIES, 7; *Western Union Tel. Co. v. Henley, 14.*

MISCONDUCT OF COUNSEL—

Comment on Interrogatories to Jury.—A statement made by counsel in his closing argument to the jury that "this interrogatory is a trap, fixed for you, and you should not be caught by it," was a legitimate argument, since such language could only have been understood by the jury as meaning that the question was misleading, or was subject to two meanings. *Pape v. Hartwig*, 333.

MORTGAGES—A mortgage does not gain priority over a mechanic's lien by reason of the fact that it was executed and recorded prior to the filing of the notice of the mechanic's lien. See **MECHANICS' LIENS**, 3; *Northwestern, etc., Assn. v. McPherson*, 250.

Foreclosure.—Rents During Year of Redemption.—Appellant brought suit to foreclose a mortgage, and appellee and others filed cross-complaints for the foreclosure of junior mortgages and mechanics' liens. The judgment of appellant was made a first lien, and that of appellee the second. The property was sold under appellant's judgment and bid in by appellant for the full amount of its judgment and costs, and at the expiration of the year for redemption appellant received a deed for the property. The court, upon the application of appellee, directed the receiver to pay the rents collected during the year of redemption to appellee, from which appellant appealed. *Held*, that neither appellant nor appellee was entitled to the rents. *Tosetti Brewing Co. v. Goebel*, 99.

MUNICIPAL CORPORATIONS—See **STREET IMPROVEMENTS**.

Action to recover penalty for violation of city ordinance is a civil action. See **ACTION**, 1; *City of Greensburg v. Cleveland, etc., R. Co.*, 141.

Notice of defective sidewalk to city officers, see **NEGLIGENCE**, 3; *City of Bedford v. Woody*, 231.

NATURAL GAS—

1. *Negligence of Company.—Insurance.*—A complaint by an insurance company against a natural gas company, charging that certain property insured by plaintiff was destroyed by fire by reason of the carelessness and negligence of defendant in failing to provide a night watchman to control the supply of gas, without fault of the owner, and that plaintiff had paid the loss and had been subrogated to the rights of the owner, states a cause of action.

Indiana, etc., Gas Co. v. New Hampshire Ins. Co., 298.

2. *Negligence.—Complaint.—Contributory Negligence.*—A complaint in an action against a natural gas company for damages to plaintiff's house caused by an overheated stove alleged that plaintiff had control of all gas appliances within her home, except the mixer; that defendant over plaintiff's protest substituted a number seven for a number five mixer, but did not show that defendant was bound to furnish such mixer as the consumer wished, or that the fire might not have occurred with either mixer; that a valve was placed in the pipe to regulate the flow of gas, but that the amount of the flow depended entirely upon the pressure, which was regulated by the company; that the "valve was used to turn off and put on the gas," and that "she had carefully adjusted the valve to suit the pressure before her absence." *Held*, that the complaint fails to show any negligence on the part of defendant, and also fails to show that plaintiff was free from fault.

Ibach v. Huntington Light, etc., Co., 281.

NEGLIGENCE—See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; STREET RAILROADS.

Action for destruction of property by fire by reason of the negligence of natural gas company, see NATURAL GAS, 1, 2; *Indiana, etc., Gas Co. v. New Hampshire Ins. Co.*, 298; *Ibach v. Huntington Light, etc., Co.*, 281.

1. *Pleading.—Contributory Negligence.—Municipal Corporations.—Defective Sidewalk.*—A general allegation of freedom from fault in a complaint for damages for a personal injury caused by a fall upon a defective sidewalk is not overcome by facts pleaded showing that the condition of the sidewalk was such that its defects could be observed by persons passing over it; as plaintiff was not required to forego travel upon it, and the degree of care used was a question for the jury. *City of Bedford v. Woody*, 231.
2. *Knowledge of Danger.—Cities.*—The fact that plaintiff, a month before her injury, knew of a defect in a sidewalk is not inconsistent with a finding that she had no knowledge of it at the time of her injury. *City of Bluffton v. McAfee*, 112.
3. *Notice.—Instructions.—Municipal Corporations.—Defective Sidewalk.*—Available error cannot be predicated upon the action of the court in instructing the jury, in an action against a city for damages arising from a defective sidewalk, to the effect that the notice of the defect, to be effective, might be to all or any of the city officers, where no attempt was made to prove actual notice, but the question was determined wholly from proof of constructive notice. *City of Bedford v. Woody*, 231.
4. *Railroads.—Statutory Signals.*—Answers to interrogatories in an action for an injury at a railroad and highway crossing by which the jury found that the bell upon the locomotive was not rung continuously from a point not less than eighty nor more than one hundred rods from the crossing until such engine had fully passed the crossing, shows negligence *per se* on the part of the railroad company. *Lake Erie, etc., R. Co. v. Graver*, 678.
5. *Proximate Cause.—Negligence Per Se.*—It does not necessarily follow from the fact that an injury happened at a time when defendant was violating a city ordinance, constituting negligence *per se*, that the injury occurred because of the violation, nor does such fact dispense with the requirement imposed upon plaintiff to show that such negligence was the proximate cause of the injury sued for. *Lake Erie, etc., R. Co. v. Mikesell*, 395.
6. *Railroads.—Injury at Crossing.—Interrogatories to Jury.—Conflict with General Verdict.*—Answers to interrogatories in an action by plaintiff for injuries received at a railroad and highway crossing by being struck by a train, to the effect that plaintiff was approaching the crossing, which he knew to be extraordinarily dangerous, traveling in a farm wagon, and at several points from about 800 feet from the crossing he could have seen the track and approaching train, which he knew was about due, by looking through between rows of trees in an orchard; that when he got within thirty-five feet of the crossing he could have had an unobstructed view of the track for 800 feet in the direction of the approaching train, and could have heard the noise of the approaching train, show plaintiff to have been guilty of contributory negligence, and are in irreconcilable conflict with a general verdict for plaintiff. *Lake Erie, etc., R. Co. v. Graver*, 678.
7. *Railroads.—Fires from Engines.*—The negligent use of proper machinery may be made the basis of an action against a railroad company for damages for burning property adjacent to the railroad. *McDoel, Rec., v. Gill*, 95.

NEW TRIAL—

1. *Striking Out Cross-Complaint.*—Sustaining a motion to strike out a cross-complaint is not ground for a new trial.
Brackett v. Brackett, 530.
2. *Newly Discovered Evidence.—Diligence.*—A party asking for a new trial on the ground of newly discovered evidence must show facts from which the court can determine whether he has exercised due diligence.
Rinehart v. State, ex rel., 419.
3. *Newly Discovered Evidence.*—To warrant the granting of a new trial on account of newly discovered evidence, the evidence must be of such a character that it would likely change the result. *Ib.*
4. *Newly Discovered Evidence.*—A new trial will not be granted on account of newly discovered evidence, when such evidence is merely cumulative. *Ib.*

NON EST FACTUM—Burden of proof under plea of *non est factum* in action on promissory note, see **BILLS AND NOTES**, 1; *Pope v. Branch, etc., Bank, 210.*

NOTES—See **BILLS AND NOTES**.

NUISANCE—

1. *Abatement. — Permanency of Injury. — Measure of Damages.* — Where the acts complained of in an action for damages to plaintiff's property and the comfortable enjoyment thereof consisted of defendant's casting into a large pond near her premises carloads of dirt and offensive material, causing thereby the water to become foul and poisonous, the nuisance was one which could be abated, and plaintiff could not recover for the permanent injury to her property.
Cleveland, etc., R. Co. v. King, 573.
2. *Permanency of Injury.—Excessive Damages.*—Where in the trial of an action for damages to plaintiff's property caused by a nuisance created and maintained by defendant there was no evidence of specific physical injury to the property except the pollution of the water of a well on the premises, and the rental value of the premises prior to the nuisance was shown to be \$7 a month, and during its continuance, twelve months, the rental value was \$2 a month, and the nuisance was one which could be abated, a judgment for \$900 was excessive. *Ib.*

OFFICERS—See **COUNTY COMMISSIONERS; JUDGES.**

Executing note for corporation, see **BILLS AND NOTES**, 15; *Holt v. Sweetzer, 237.*

OPINION EVIDENCE—As to value of farm land, see **EVIDENCE**, 21; *Pennsylvania Co. v. Hunsley, 37.*

PARENT AND CHILD—As to the right of adopted child to take under a will the same as a natural child, see **WILLS**, 8; *Bray v. Miles, 432.*

As to funeral expenses of child, see **DECEDENTS' ESTATES**, 5; *Rowe v. Raper, 27.*

PARTNERSHIP—As to pleadings in actions between partners, see **PLEADING**, 19; *Beckett v. Little, Adm., 65.*

PAYMENT—Acceptance of check containing statement "to be accepted in full of account" does not amount to an accord and satisfaction. See **ACCORD AND SATISFACTION**; *Jennings v. Durlinger, 673.*

PERSONAL INJURIES—Caused by defective sidewalk, see CONTRIBUTORY NEGLIGENCE; *City of Bluffton v. McAfee*, 112.

PLEADING—See ABATEMENT; COMPLAINT.

As to plea of *non est factum*, see BILLS AND NOTES, 1, 2, 3, 5; *Pope v. Branch, etc., Bank*, 210.

Correction of judgment, see JUDGMENTS, 8; *Morrow v. Geeting*, 494.

When general allegation of freedom from fault is not overcome by facts pleaded, see NEGLIGENCE, 1; *City of Bedford v. Woody*, 231.

A defective cross-complaint is not cured by verdict where the opposite party presented the question of its sufficiency by demurrer. See APPEAL AND ERROR, 34; *Pape v. Kaough*, 525.

1. *Complaint.—Railroad.—Stock Killed.*—An allegation in a complaint that defendant, a railroad company, owned, used and operated a certain railroad with tracks, etc., in the county of Boone, and that plaintiff was the owner of a certain hog which, "at said time and place," strayed on the track of said railroad and was killed, sufficiently shows that the hog was killed in Boone county.

Chicago, etc., R. Co. v. Spencer, 605.

2. *Complaint.—Railroad.—Stock Killed.*—A demurrer to a complaint in the circuit court against a railroad company for \$8 damages for the killing of a hog, on the ground that "the court had no jurisdiction over the subject-matter of the action alleged in the complaint," is sufficient to raise the question of the jurisdiction of the court. *Ib.*

3. *Recitals.—Conclusions.—Railroads.*—A complaint against a railroad company charging that defendant, while wrongfully and unlawfully engaged in running a train of cars within the corporate limits of the city at a faster rate of speed than four miles an hour, contrary to and in violation of an ordinance of such city, struck and killed decedent, cannot be said to aver as facts that there was in force at the time an ordinance limiting the speed of trains to four miles an hour, and that the particular train was running beyond the ordinance rate. *Lake Erie, etc., R. Co. v. Mikesell*, 395.

4. *Complaint.—Motion to Make More Specific.—Practice.*—A complaint will not be held bad on an assignment that it does not state facts sufficient to constitute a cause of action, where the defects could have been reached by a motion to make more specific.

City of Hammond v. Meyers, 235.

5. *Condition Precedent.—Insurance.*—A complaint in an action on a fire insurance policy which avers that the plaintiff has duly and fully performed all of the conditions of the policy on his part to be performed, sufficiently avers the performance of the conditions precedent contained in the policy, within the meaning of §373 Burns 1894, which provides, that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege, generally, that the party performed all of the conditions on his part.

Fort Wayne Ins. Co. v. Irwin, 53.

6. *Judgments.—Jurisdiction.*—Where it is averred in a complaint to enforce a judgment that the judgment was rendered by a court of general jurisdiction, it is not necessary that the averments show affirmatively that the court had jurisdiction to render the judgment sued upon.

City of Hammond v. Evans, 501.

7. *Complaint in Two Paragraphs.—Jurisdiction.*—Where a complaint in two paragraphs alleges two causes of action, the fact that

PLEADING—Continued.

the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other.

Chicago, etc., R. Co. v. Spencer, 605.

8. *Judgments.*—A judgment is a debt of record, and, as such, may be made the foundation of an action, and, in a suit to recover such debt, an averment that it is due and unpaid is sufficient to show that the judgment is in full force.

City of Hammond v. Evans, 501.

9. *Complaint Questioned for First Time on Appeal.*—When a complaint, questioned for the first time in the assignment of errors, is sufficient to bar another action for the same cause, it will be held good.

McCreery v. Nordyke, 630.

10. *Cross-Complaint.—Reformation of Instruments.*—A cross-complaint seeking to reform and enforce a contract is bad on demurrer where the contract does not purport to be the contract of the party against whom its enforcement is asked, and there are no allegations connecting plaintiff with the parties to the contract.

Pape v. Kaough, 525.

11. *Plea in Abatement.*—Where it does not appear in the complaint that there was no jurisdiction of the person, an objection on that ground, by plea in abatement, after an appearance and demurrer, comes too late.

Fort Wayne Ins. Co. v. Irwin, 53.

12. *Demurrer.*—A demurrer to the second and third paragraphs of answer for the reason "that neither of said paragraphs states facts sufficient to constitute a defense to this action," is a joint demurrer, and if not good as to both paragraphs it need not be considered as to either.

Kenney, Rec., v. Wells, 490.

13. *Joint Demurrer*—A demurrer to a complaint in two paragraphs, upon the ground that "the court had no jurisdiction over the cause of action alleged in either paragraph of said complaint," is not objectionable as a joint demurrer.

Chicago, etc., R. Co. v. Spencer, 605.

14. *Demurrer to Counterclaim.—Form of Demurrer.*—A demurrer to a counterclaim for the reason "that the same does not state facts sufficient to constitute a good counterclaim against the plaintiff" is improper; the cause of demurrer should be that the pleading does not state facts sufficient to constitute a cause of action.

Storrs & Harrison Co. v. Fusselman, 293.

15. *Answer.—Joint Demurrer.*—A demurrer stating that "plaintiff demurs to the second and third paragraphs of defendant's answer, on the ground that said paragraphs do not state facts sufficient," etc., is a joint demurrer; and if one of the paragraphs is good the demurrer must be overruled as to the other.

Franklin Ins. Co. v. Wolff, 549.

16. *Contract.—When Not Alleged to be in Writing.*—Where a contract upon which an answer is based is not alleged to be in writing the answer will be treated as founded upon an oral contract.

Perkins, etc., Co. v. Yeoman, 483.

17. *Contract.—Variance.*—Where a defense is based upon a contract not in writing, and the contract appears upon the trial to be a written one, the defense must fail.

Ib.

18. *Suit Brought in Wrong County.*—An objection that the action was brought in the wrong county must be raised by answer, where such fact does not appear on the face of the complaint.

Fort Wayne Ins. Co. v. Irwin, 53.

PLEADING—Continued.

19. *Partnership.—Decedents' Estates.*—In an action on a promissory note brought by the administrator of a deceased partner against a surviving partner, an answer charging that defendant, in the settlement of the partnership, paid out of his private funds a certain sum of money which he asked to be set off against the note, is fatally defective, where it was not alleged that the partnership was insolvent and its assets exhausted.

Beckett v. Little, Adm., 65.

20. *Answer.—Non Est Factum.—Bills and Votes.—Alteration of Note.—Instructions.*—Where a plea of *non est factum* was interposed in an action on a promissory note, and the evidence showed that a material alteration was made in the note after its execution, without the knowledge or consent of defendant, the court erred in instructing the jury that they should find for the plaintiff if it was shown by a preponderance of the evidence that defendant executed the note.

Pope v. Branch, etc., Bank, 210.

21. *Judgments.—Review.—Limitation of Actions.*—Where an amended complaint seeking to review a judgment does not set up any right not asserted in the original complaint asking for equitable relief from the judgment by way of injunction, an answer that the cause of action mentioned in the amended complaint did not accrue within the time limited by statute is an argumentative denial, stating a legal conclusion, and is bad on demurrer.

Springfield, etc., Co. v. Michener, 130.

22. *Mistake.—Words and Phrases.*—In an action by a contractor to foreclose a street improvement assessment, an allegation in a reply that plaintiff "did not enter into the contract" is corrected by the pleading itself, which avers that he began the improvement on a certain day according to his said contract.

Willard v. Albertson, 162.

23. *Practice.—Harmless Error.*—Available error cannot be predicated upon the action of the court in overruling a demurrer to a bad reply, where the answer to which it was addressed was also bad.

Beckett v. Little, Adm., 65.

PRACTICE—See TRIAL.

A party is bound by the theory of his complaint on which he tried the cause. See TRIAL, 1; *Cleveland, etc., R. Co. v. King, 573.*

Each interrogatory propounded to the jury must present a single material fact involved in the issues.

Pope v. Branch, etc., Bank, 210.

1. *Harmless Error.*—The overruling of a demurrer to a pleading is not material where the facts necessary to a recovery are found in the special finding of facts. *Lewis v. Albertson, 147.*
2. *Cross-Examination.—Offer to Prove.—Harmless Error.*—A cause will not be reversed on account of the action of the court in permitting counsel to make an offer, in the presence and hearing of the jury, to prove the facts as detailed in a question propounded to a witness on cross-examination, to which an objection had been sustained, where the court informed the jury not to consider any facts stated in the offer to prove, and it appears from the record that a correct conclusion was reached by the jury. *Pape v. Hartwig, 333.*
3. *Motions.—New Trial.—Arrest of Judgment.*—A motion for a new trial cannot be made after filing a motion in arrest of judgment. *Willard v. Albertson, 166.*

PRINCIPAL AND AGENT—Action by principal against agent for conversion of wheat purchased by agent, see **CONVERSION**, 2; *Nading v. Howe*, 690.

Insurance agent may waive the payment of premium in cash. See **INSURANCE**, 1; *Western Assurance Co. v. McAlpin*, 220.

1. *Refusal of Agent to Deliver Property Purchased.—Conversion.—Measure of Damages.*—Wheat purchased by an agent for his principal is the property of the principal, and a refusal of the agent to deliver to his principal wheat so purchased amounts to conversion by the agent, and the principal may in an action for damages recover a sum equal to the profit he might have made by a subsequent sale thereof. *Nading v. Howe*, 690.
2. *Refusal of Agent to Deliver Wheat Purchased for Principal.—Conversion.—Tender.*—Where, under an agreement between an agent and his principal, the agent was to purchase wheat for the principal, the latter to furnish money for that purpose whenever called upon to do so, but the agent failed to call for the money, and refused to deliver to the principal the wheat purchased, the principal in an action against the agent for the profits need not show a tender of the purchase price of the wheat so bought. *Ib.*

PRINCIPAL AND SURETY—Delivery of bond not signed by all of the sureties named in the body of the bond, see **BONDS**, 1, 2, 8; *Davis v. O'Bryant*, 376.

When change in building contract will not release sureties on bond given to secure the performance of the contract, see **CONTRACTS**, 1; *Higgins v. Quigley*, 348.

Release of surety by alteration in note by principal and payee, see **BILLS AND NOTES**, 4; *Moore v. Hinshaw*, 267.

1. *Bond.—Guaranty.*—A bond executed by a salesman and his sureties, conditioned that the salesman should faithfully account for and pay over or deliver unto his employer all moneys, securities or other personal property coming into his possession or control, is a contract of suretyship, and not a collateral guaranty. *Durand & Kasper Co. v. Rockwell*, 11.
2. *Bond.—Contracts.*—A condition in a contract entered into by a salesman with his employer that he would conform to any and all rules now in force or hereafter established by the employer for the conduct of its business is broad enough to include a requirement that the salesman should collect the money for goods he himself sold. *Ib.*
3. *Bond.—Action on.*—Where by the terms of a bond the sureties are jointly bound with the principal as original promisors, the liability of all the obligors in the bond accrues at the same time, and arises from one breach of the same contract. *Ib.*
4. *Bonds.*—Where a lumber company signed a bond with a contractor to secure the performance of a contract entered into by such contractor not to permit any liens to be filed against the property for material or work done in the construction of the building, the lumber company was not a collateral guarantor, but was bound jointly with the principal as an original promisor. *Wittmer Lumber Co. v. Rice*, 586.
5. *Corporations.—Contractor's Bond.—Ultra Vires.—Estoppel.*—Where a corporation signed a bond with a contractor to secure the performance of a contract not to permit any liens to be filed

PRINCIPAL AND SURETY—Continued.

against the property for material or work done in the construction of the building in consideration of an agreement entered by such contractor to purchase material from the corporation to be used in the construction of the building, the corporation cannot defeat an answer pleading the bond in bar of an action by it to foreclose a lien on such building for material furnished, on the ground that the contract of suretyship was *ultra vires*. *Ib.*

PRISONS—

Care of County Prisoners by City.—County not Liable.—A county is not liable to a city located in the county for the board of prisoners incarcerated in the city jail, nor for the expense of transporting such prisoners to the county jail.

City of Alexandria v. Board, etc., 110.

PROCESS—

Service on Insurance Company.—Return.—The return of the sheriff to a summons directing service upon a domestic insurance company of a named city, showing that he had served the summons by handing it to defendant's agent in the county in which the suit was brought, neither the president nor chief officers of the company being found in the county, and that the agent examined it, and advised him to send it to the general agent in another county, is sufficient within the meaning of §§316, 318, 319 Burns 1894.

Fort Wayne Ins. Co. v. Irwin, 53.

PROMISSORY NOTES—See BILLS AND NOTES.**RAILROADS—See CARRIERS; NEGLIGENCE; STREET RAILROADS.**

Sufficiency of complaint in action for stock killed on railroad track, see PLEADING, 1, 2; *Chicago, etc., R. Co. v. Spencer, 605.*

Sufficiency of complaint in action against a railroad company for death of plaintiff's decedent caused by running train more than four miles an hour in corporate limits of a city, in violation of ordinance, see PLEADING, 8; *Lake Erie, etc., R. Co. v. Mikesell, 395.*

The negligent use of proper machinery may be made the basis of an action against a railroad company for damages for burning property adjacent to railroad. See NEGLIGENCE, 7; *McDoel, Rec., v. Gill, 95.*

RECEIVERS—As to what is sufficient notice of an appeal, to a receiver residing outside of the State, see APPEAL AND ERROR, 40; *Wolfe v. Peirce, Rec., 591.*

1. *Action Against.—Complaint.*—The complaint in an action against a receiver must contain an averment that leave to bring the action had been obtained from the court by which the receiver had been appointed. *Peirce, Rec., v. Chism, 505.*

2. *Resignation Pending Suit.—Change of Parties.—Appeal.—Railroads.*—Where the receiver of a railroad company resigned pending a suit against him as such receiver, and the defense was taken up by his successor, judgment was properly rendered in the name of the original receiver, and an appeal might be taken by plaintiff from such judgment without change of parties in the assignment of errors. *Wolfe v. Peirce, Rec., 591.*

REFORMATION OF INSTRUMENTS—Sufficiency of cross-complaint seeking to reform and enforce a contract, see PLEADING, 10; *Pape v. Kaough*, 525.

REPLEVIN—In an action to recover property alleged to have been procured by fraud, where the facts relied on to show fraud are consistent with either good or bad faith, the presumption of good faith will prevail. See FRAUD, 1; *Roehm v. Reed*, 547.

1. *Possession*.—In order to maintain an action in replevin it must be shown that defendant was in possession, actual or constructive, at the commencement of the action. *West, Tr., v. Graff*, 410.
2. *Complaint*.—*Ownership of Property*.—A complaint in an action in replevin which alleges that plaintiff is the owner and entitled to the immediate possession of certain described personal property, unlawfully obtained by defendant, contains a sufficient averment as to the title of the property. *Goodman v. Sampliner*, 72.
3. *Demand*.—Where property is obtained by a purchaser through fraud, the seller may rescind the sale and recover possession by an action in replevin without making any demand before the commencement of the action, where the property is in the possession of the purchaser or his trustee for the benefit of creditors. *West, Tr., v. Graff*, 410.
4. *Judgment*.—In an action in replevin the judgment may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention. *Ib.*
5. *Fraud*.—*Concealment*.—A purchaser of goods on credit, who at the time knows himself to be insolvent, and does not intend to pay for same, and fails to disclose his insolvency, perpetrates a fraud upon the seller which entitles him to disaffirm the sale and replevy the goods, unless the rights of innocent parties have intervened. *Goodman v. Sampliner*, 72.
6. *Action on Bond*.—*Parties*.—The assignee of a judgment may maintain an action on a bond given the sheriff in replevin of goods levied upon by virtue of an execution issued for the collection of the judgment without making the sheriff a party. *Kahn v. Gavit*, 274.

SALES—See BROKERS; VENDOR AND PURCHASER.

SHERIFF—When not a necessary party in action on replevin bond given such officer, see REPLEVIN, 6; *Kahn v. Gavit*, 274.

SIGNATURES—Liability of officers executing note for corporation, see BILLS AND NOTES, 15; *Holt v. Sweetzer*, 237.

Delivery of bond which does not contain the signatures of all the persons named in the body of bond, see BONDS, 1, 2, 3; *Davis v. O'Bryant*, 376.

SPECIAL FINDING—See VERDICT.

When in Conflict with General Verdict.—*Master and Servant*.—Where, in an action for damages for personal injuries received by plaintiff while employed in a quarry, the complaint alleged that plaintiff was employed to do special work as a wheeler, which was not dangerous, and that he was ordered to leave his said employment and work upon a channeling machine, which was dangerous, without any warning of the danger, a special finding that plaintiff was employed to do general work is in conflict with a general verdict for plaintiff, under the allegations of the complaint, and precludes a recovery. *Consolidated Stone Co. v. Redmon*, 319.

STATUTE OF FRAUDS—

Promise to Answer for Debt of Another.—Where plaintiff procured a person to perform services for defendants on the promise of defendants that they would pay such person his salary and would pay plaintiff whatever sum he might pay or become liable to pay to such third person for board or livery hire while in the service of defendants, such agreement was not a promise to answer for the debt, default, or miscarriage of another within the meaning of the second clause of the statute of frauds. *Week v. Widgeon, 405.*

STATUTORY CONSTRUCTION—For table of statutes cited and construed, see page xxix.

STREET IMPROVEMENTS—

1. *Declaratory Resolution.—Jurisdiction.*—It is not necessary to pass a resolution declaring the necessity of a street improvement in order to give the common council jurisdiction.
Willard v. Albertson, 164.
2. *Resolution.*—A resolution for street improvements may embrace more than one street.
Lewis v. Albertson, 147.
3. *Ordinance for Improvement of Two Streets.—Assessments.*—Where an ordinance was passed for the improvement of two streets and only one was improved, the costs thereof cannot be assessed on both streets.
Willard v. Albertson, 164.
4. *Notice.*—Notice of the time when property owners along the line of the proposed street improvement could make objections to the necessity of the construction thereof is unnecessary.
Lewis v. Albertson, 147.
5. *Cities.—Legality of Incorporation.*—The legality of the incorporation of the city cannot be attacked in an action to foreclose assessments for street improvements.
Willard v. Albertson, 164; Willard v. Albertson, 166.
6. *Foreclosure of Assessment.—Complaint.—Title to Street.*—A complaint to foreclose an assessment for street improvements need not allege that the city had title to the street. *Lewis v. Albertson, 147.*
7. *Foreclosure of Assessments.—Complaint.*—A complaint to foreclose street improvement assessments need not state whether the proceedings were had at a regular or special meeting of the city council.
Ib.
8. *Foreclosure of Assessment.—Complaint.*—In a complaint to foreclose street improvement assessments it is not necessary to set out in detail all of the proceedings of the common council relative to the improvement.
Ib.
9. *Foreclosure of Assessments.—Complaint.—Plans and Specifications.*—It is not necessary to make the plans and specifications for the improvement of a street a part of the complaint in an action to foreclose an assessment.
Ib.
10. *Foreclosure of Assessments.—Complaint.—Contract.*—In an action to foreclose an assessment for street improvements the assessment is the foundation of the action, and the contract for the improvements need not be made part of the complaint.
Ib.
11. *Foreclosure of Assessments.—Complaint.*—A complaint to foreclose street improvement assessments need not allege a previous demand.
Ib.
12. *Foreclosure of Assessments.—Complaint.*—A complaint to foreclose street improvement assessments need not specifically

STREET IMPROVEMENTS—Continued.

allege that the assessments were due, where the allegations showed that the assessments were made, and the time for payment, as provided by statute, had passed. *Ib.*

13. *Pleading.—Fraud.—Due Process of Law.*—An answer to a complaint in an action to foreclose assessments for street improvements charging fraud and want of due process of law must state facts from which the court can determine the existence of fraud or the want of due process of law. *Willard v. Albertson, 164.*

14. *Time in which Work was Done.—Notice.*—A reply in an action to foreclose street improvement assessments alleging that plaintiff entered upon the work of improving the street in a certain month and year, employing a large number of men and teams, and that defendant lived on the street improved, within plain view of the same, and of the work, sufficiently states the time when the work was done, and knowledge of defendant regarding the work. *Lewis v. Albertson, 147.*

15. *Foreclosure of Assessments.—Pleading.—Estoppel.*—A reply by a contractor in an action to foreclose an assessment for street improvements, alleging that all of the proceedings were had by the common council, and all notices given as set out in the complaint, that he performed the work under the direction of the city civil engineer; that he employed a large number of men and expended a large sum of money in making the improvements, and that defendant resided in the city and street in which the improvements were made, and saw the work going on and made no objection, states facts sufficient to constitute an estoppel, although the reply referred to certain exhibits as being filed with the answer which were not filed. *Willard v. Albertson, 162.*

STREET RAILROADS.

1. *Injury to Passengers.—Contributory Negligence.*—Plaintiff entered a street-car after dark which was running backward toward the central part of the city on a single track. At the intersection of a double track the car ran forward on the west track instead of the east, thus placing the running-board extending along the side of the car next to the trolley poles between the tracks. Plaintiff, observing that he was being carried away from his destination, and not knowing that the car was on the wrong track, stepped upon the running-board and started toward the conductor to procure a transfer ticket, when he was struck by a trolley pole and injured. *Held*, that the question of plaintiff's negligence was properly submitted to the jury. *Citizens, etc., R. Co. v. Hoffbauer, 614.*
2. *Horse Frightened at Approach of Car.—Special Finding.—Overthrow of General Verdict.*—In an action against a street railway company for damages for personal injuries to plaintiff's wife, the special findings showed that while plaintiff and his wife were driving across a covered bridge their horse took fright at a car coming around a curve from the opposite direction, and the action of the horse in its attempt to run away caused plaintiff's wife to fall from the buggy, injuring her; the jury found that it was not in evidence that the car was being run without due regard for the safety of persons traveling in private conveyances; that the motorman who had charge of the car applied the brake for stopping the car as soon as he could do so after he saw that the horse was showing signs of fright; that the car at the time of the accident was on an ascending grade and could have been easily stopped before it was

STREET RAILROADS—Continued.

stopped, and if it had been stopped at the foot of the grade, the accident would probably have been avoided. *Held*, that the facts found were irreconcilably inconsistent with a general verdict for plaintiff. *Marion, etc., R. Co. v. Dubois, 342.*

3. *Horse Frightened at Approach of Car.—Personal Injuries.*—A street railway company is not liable for an injury caused by the mere fright of a horse at an approaching car, where there is no reckless or wanton conduct indicating disregard of the safety of those using the street for passage, or malicious purpose to injure them. *Ib.*

4. *Evidence.—Contributory Negligence.*—In the trial of an action against a street railway company for injury to a passenger while passing along the running-board of the car, evidence that the usual and ordinary use of the running board was for passengers to go from one part of the car to another, and that passengers used it for that purpose, was properly admitted in evidence as showing defendant's knowledge of the general uses of the running-board in determining the question of contributory negligence.

Citizens, etc., R. Co. v. Hoffbauer, 614.

SUNDAY—An action will not lie against a telegraph company for failure to transmit a telegram on Sunday, unless a reasonable necessity for sending the same is shown. See **TELEGRAPH COMPANIES, 1**; *Western Union Tel. Co. v. Henley, 14.*

TAXATION—

Failure to List Property for Taxation —Affidavit and Information.

—*Criminal Law.*—An affidavit and information charging that defendant "being requested as required by law," failed to give a true list of his property for taxation is sufficient to charge the offense defined by §2271 Burns 1894 without setting out the exact manner in which the request to furnish a list of taxable property was made by the assessor. *State v. Hilgendorf, 207.*

TELEGRAPH COMPANIES—

1. *Sunday Messages.—Failure to Transmit.—Damages.—Complaint.*—A complaint in an action to recover damages for failure to transmit a telegraph message which discloses that the contract was made on Sunday must show a reasonable necessity for sending the message on that day, and that the telegraph company had notice of the necessity. *Western Union Tel. Co. v. Henley, 14.*
2. *Sunday Message.—Failure to Transmit.—Complaint.—Necessity.—Notice.*—A complaint against a telegraph company for failure to transmit a message on Sunday, which contains facts indicating a reasonable necessity for delivering it on that day, but which does not show that the company was informed of such facts, is bad on demurrer. *Ib.*
3. *Sunday Message.—Necessity.—Notice.*—A telegraph message which stated that the sender would arrive in the city where the sendee resided at a certain time, does not, on its face, show a reasonable necessity for its transmission on Sunday. *Ib.*
4. *Sunday Message.—Necessity.—Notice.*—The reasonable necessity for sending a telegraph message on Sunday, and the notice thereof to the company, may be shown by the contents of the dispatch itself, and if the language of the message be not sufficient for such purposes, the same may be shown by the averment of ex-

TELEGRAPH COMPANIES—Continued.

trinsic facts in the complaint in an action for damages for failure to send a telegraph message contracted for on Sunday. *Ib.*

5. *Sunday Message.—Necessity.—Evidence.*—In the trial of an action against a telegraph company for its failure to send a dispatch on Sunday informing the person to whom it was addressed that her sister would arrive at a certain time, evidence that the company's agent was informed at the time the message was delivered to him for transmission, that the sender was anxious to have the message go at once, as her mother, who lived with the sister to whom the message was directed, was on her death-bed, is sufficient to show a reasonable necessity for sending the message on Sunday. *Ib.*

6. *Sunday Message.*—Damages cannot be recovered from a telegraph company for its failure to transmit a message on Sunday in violation of law. *Ib.*

7. *Failure to Transmit Message.—Damages.—Proximate Cause.*—A telegraph message informing the person to whom it was directed that the sender would arrive in the city where the former lived at a certain time, over a certain railroad, was delivered to the company's agent with the request that it be sent at once, as the sender's mother was on her death-bed at the home of the sender's sister, to whom the message was directed. The company failed to transmit the message, and the sender brought suit for damages and obtained a verdict upon the theory that damages were recoverable for mental distress and nervous prostration suffered by plaintiff by reason of the fact that no person met her when she arrived at the railway station. *Held*, that such a consequence could not have been reasonably anticipated by the parties at the time the contract was made as the result of the breach of it, and that damages cannot be recovered therefor. *Ib.*

THEORY—A party is bound by the theory of his complaint on which he tried his cause. See **TRIAL**, 1; *Cleveland, etc., R. Co. v. King*, 573.

TORTS—When action in tort for loss of live stock in shipment will be defeated by contract exempting defendant from liability, see **CARRIERS**, 8; *Parrill v. Cleveland, etc., R. Co.*, 638.

TRIAL—See **EVIDENCE**; **INSTRUCTIONS**; **INTERROGATORIES TO JURY**; **MISCONDUCT OF COUNSEL**; **PRACTICE**.

Effect of withdrawal of juror, see **CONTINUANCE**; *Wabash R. Co. v. McCormick*, 258.

1. *Complaint.—Theory.*—Where plaintiff, in the trial of an action for damages to property caused by a nuisance, upon objection being made to certain testimony offered, at the request of the court, stated that the theory of her complaint was for permanent damages, and defendant withdrew its objections, and the court stated that he would instruct the jury upon the theory so announced, the plaintiff will be held to such theory.

Cleveland, etc., R. Co. v. King, 573.

2. *Witness Directed by Court to Leave Stand.*—It is not prejudicial error for the court to direct a witness to leave the stand after such witness has answered the last question propounded to him on cross-examination, and no objection is made to his answer.

Phenix Ins. Co. v. Jacobs, 509.

TRIAL—Continued.

3. *Venire de Novo*.—The failure to find material facts in a special finding or verdict is not cause for a *venire de novo*.

Miller v. Stevens, 365.

4. *Venire de Novo*.—Before a motion for a *venire de novo* will lie, the verdict or finding must be so defective that no judgment can be rendered thereon. *Ib.*

VENDOR AND PURCHASER—

1. *Fraud*.—Where a vendor in negotiating a sale of real estate falsely represented to the purchaser that a certain mortgage thereon in favor of a building and loan association had all been repaid except \$500, which was payable in monthly instalments of \$13.47; that the association had represented to vendor that the loan would be fully repaid in seventy-two instalments, and that only thirty-six instalments remained to be paid, when in fact the association represented to him that the stock would not mature in less than eighty-four months, such representation was not the statement of an opinion, but of a fact on which the purchaser had the right to rely. *Loucks v. Taylor*, 245.

2. *Fraud—Deeds—Failure to Read Clause in Deed*.—Where the purchaser of real estate encumbered by a mortgage could not read because of defective eyesight, was inexperienced in business, and wholly unacquainted with the forms of deeds and contracts, but had confidence in the vendor, who upon reading the deed to him failed to read a clause therein stating that grantee assumed and agreed to pay a certain mortgage, when in fact the purchaser had only agreed to pay a certain balance represented by vendor to be due thereon, such failure was a fraud upon the purchaser. *Ib.*

VENIRE DE NOVO—The failure to find material facts in a special finding or verdict is not cause for *venire de novo*. See TRIAL, 8; *Miller v. Stevens*, 365.

Before a motion for a *venire de novo* will lie, the verdict or finding must be so defective that no judgment can be rendered thereon. See TRIAL, 4; *Ib.*

VERDICT—See SPECIAL FINDING.

When discrepancy between the amount of verdict and the amount found due is not cause for reversal, see APPEAL AND ERROR, 17; *Beckett v. Little, Adm.*, 65.

1. *Special Finding—Conflict*.—The general verdict must stand as against the facts specially found, unless such facts are in irreconcilable conflict with the general verdict.

Lake Erie, etc., R. Co. v. Graver, 678.

2. *Special Finding—Conflict*.—Where the jury in answer to an interrogatory in an action against a railroad company for an injury at a railroad and highway crossing stated that the failure of defendant to sound the whistle and ring the bell might have been the proximate cause of the plaintiff's injury, and in answer to other interrogatories found that defendant did sound the whistle, such findings do not establish the fact that the failure to ring the bell was the proximate cause of the injury, but leave the fact established by the general verdict that such failure was the proximate cause of the injury unimpeached. *Ib.*

VERDICT—Continued.

3. *Answers to Interrogatories.—Presumptions.*—No presumptions will be indulged in favor of answers to interrogatories as against a general verdict.
Indianapolis Gas Co. v. Shumack, 87; City of Bluffton v. McAfee, 112.
4. *Special Findings.—Conflict.*—The general verdict will be upheld unless the facts found and stated in the special findings are so antagonistic to the general verdict as to preclude reconciliation.
Guedelhofer v. Ernsting, 188; Miller v. Stevens, 365.
5. *Special Findings.—Overthrow of General Verdict.*—It is not sufficient for the overthrow of the general verdict for the plaintiff that the facts specially found do not establish the plaintiff's alleged cause of action, but it must appear that such facts are irreconcilably inconsistent with the general verdict.
Marion, etc., R. Co. v. Dubois, 342.
6. *Special Finding.—Conflicts.—Master and Servant.*—A general verdict for plaintiff on an allegation of the complaint charging that defendant was negligent in not warning plaintiff of the increased danger in operating a wood jointing machine while planing short, narrow, and thin pieces of lumber, as compared to larger and heavier pieces is in irreconcilable conflict with a special finding that such increased danger was as apparent to plaintiff as to defendant.
Guedelhofer v. Ernsting, 188.
7. *Special Findings.—Practice.*—Where a general verdict was returned for plaintiff in an action in replevin, and the special findings were so antagonistic that a conclusion of law as to the ownership of the property could not be deducted therefrom, the general verdict must prevail.
Sloan, Adm., v. Lowder, 118.
8. *Answers to Interrogatories.—Conflict.—Railroads.—Fires.*—Answers to interrogatories, in an action against a railroad company for damages for burning property, showing that the engine was provided with a good spark-arrester, but that the engine was improperly operated by running at too great a speed in so short a distance after starting, are not in conflict with a general verdict for plaintiff.
McDoel, Rec., v. Gill, 95.

WATERS AND WATER COURSES—

Pollution.—Damages.—Complaint.—Where a complaint for the recovery of damages for injury to the property of plaintiff resulting from the pollution of a stream charged defendant with continuously emptying into the stream from its pulp factory, located on the stream above plaintiff's farm, refuse from the mill, containing acids and other unwholesome ingredients, rendering several acres of the farm and the water in the stream unfit for use, and destroying the timber, it was not necessary to allege that the use defendant made of the stream in carrying on its business of manufacturing pulp was unreasonable or unnecessary.

Muncie Pulp Co. v. Martin, 558.

WILLS—

1. *Construction.—Introductory Clause.*—An expression in the introductory clause of a will of the purpose of the testator to dispose of all real and personal property that he might own at the time of his death, does not in itself dispose of any property, but may be found useful in resolving doubts, if any exist which may be so resolved, in particular dispositive clauses.

Meyer v. Rusterholtz, Ex., 569.

WILLS—Continued.

2. *Description of Property.—Intention of Testator.—Partial Intestacy.*—A testator in the introductory clause of his will expressed his purpose to dispose of all his property, real and personal. In the first clause he gave all his personal property "consisting of household goods" to his stepdaughter and her children. By the second clause all his real estate "including tools" was to be sold and the proceeds given to his nephew and his wife and children. No mention was made in the will of a certain note and money which he owned at the time of his death. *Held*, that the note and money were left undisposed of. *Ib.*
8. *Construction.—Parent and Child.—Adoption.*—Under a clause in a will giving property to three sons and a daughter of testator, and providing that in the event of the death of either of the four "the shares due such as may be deceased shall go to the children of such deceased person, if there be children, and if there be no children, then such share shall go to the survivors." upon the death of the daughter before the bequest became operative, without issue, her adopted child was entitled to take her share by the provision of §826 Horner 1897 that the adoptive parents shall occupy the same position to an adopted child as natural parents. *Bray v. Miles, 432.*

WITNESSES—The testimony of a deceased witness may be read as evidence in a subsequent trial. *Western Assurance Co. v. McAlpin, 220.*

Cross-examination of witnesses, see EVIDENCE, 17, 18, 19; *Pennsylvania Co. v. Hunsley, 37.*

Ex. J. M.

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